Docket for 02-1192

(14)

No. 02-1192
Title: Cooper Industries, Inc., Petitioner
v.
Aviall Services, Inc.
Docketed: February 13, 2003
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (00-10197)
Decision Date: November 14, 2002
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 12 2003	Petition for writ of certiorari filed. (Response due May 14, 2003)
Mar 17 2003	Brief of respondent Aviall Services, Inc. in opposition filed.
Mar 26 2003	Reply of petitioner Cooper Industries, Inc. filed.
Apr 2 2003	DISTRIBUTED for Conference of April 18, 2003.
Apr 21 2003	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 12 2003	Brief amicus curiae of United States filed.
Dec 23 2003	DISTRIBUTED for Conference of January 9, 2004.
Jan 7 2004	Letter and attachment received from counsel for the petitioner. (Distributed.)
Jan 9 2004	Petition GRANTED.
Feb 23 2004	Joint appendix filed.
Feb 23 2004	Brief of petitioner Cooper Industries, Inc. filed.
Feb 23 2004	Brief amicus curiae of United States filed.
Mar 8 2004	Record received from U.S.C.A. 5th Circuit. (1 box)
Mar 19 2004	Extension of time within which to file respondent's brief on the merits to and including April 8, 2004.
Mar 22 2004	Record received from U.S.D.C. Northern Dist. of Texas. (1 box)
Apr 8 2004	Brief amicus curiae of Lockheed Martin Corporation filed.
Apr 8 2004	Brief of respondent Aviall Services, Inc. filed.
Apr 8 2004	Brief amici curiae of Conocophillips Co., et al. filed.
Apr 8 2004	Brief amici curiae of States of New York, et al. filed.
Apr 8 2004	Brief amici curiae of Superfund Settlements Project et al. filed.
Apr 8 2004	Brief amici curiae of Atlantic Richfield Company, et al. filed.
Apr 20 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
May 13 2004	Reply of petitioner Cooper Industries, Inc. filed.
May 24 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jul 23 2004	CIRCULATED.
Aug 24 2004	SET FOR ARGUMENT Wednesday, October 6, 2004
Oct 6 2004	Argued. For petitioner: William B. Reynolds, Washington, D.C.; and on behalf of the United States, as amicus curiae, Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Richard O. Faulk, Houston,

Tex.

SUPREME COURT, U.S.
FILED

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No. ____

In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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145 P

QUESTION PRESENTED

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

RULE 29.6 STATEMENT

Petitioner Cooper Industries, Inc. is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Respondent Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

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In the Supreme Court of the United States

No. ____

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cooper Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit *en banc* is reported at 312 F.3d 677 (5th Cir. 2002), and appears in the Appendix ("App.") at 9a. The Fifth Circuit's grant of the petition for rehearing *en banc* by Aviall Services, Inc. is reported at 278 F.3d 416 (5th Cir. 2001), and appears at App. 46a. The panel opinion of the Fifth Circuit is reported at 263 F.3d 134 (5th Cir. 2001), and appears at App. 47a. The district court's opinion, No. 3:97-CV-1926-D (N.D. Tex. Jan. 13, 2000), is unreported and appears at App. 90a.

JURISDICTION

The judgment of the Fifth Circuit, sitting *en banc*, was entered on November 14, 2002. App. 9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the pertinent provisions of 42 U.S.C. §§ 9606, 9607, and 9613 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") appears at App. 1a-8a.

STATEMENT OF THE CASE

This case presents the issue whether a private party has a right to bring suit seeking contribution pursuant to Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), even though it has not been the subject of any underlying civil action brought pursuant to 42 U.S.C. § 9606 ("Section 106") or 42 U.S.C. § 9607 ("Section 107"). The present suit was brought in 1997 by respondent Aviall Services, Inc. ("Aviall"), seeking contribution from petitioner Cooper Industries, Inc. ("Cooper") for costs Aviall incurred in connection with its voluntary clean-up of hazardous substances from four industrial facilities Aviall had purchased from Cooper in 1981. Aviall has never been subjected to any federal enforcement or litigation, nor has the federal Environmental Protection Agency ever contacted Aviall regarding the properties or designated the sites as contaminated under federal law. App. 10a. While Aviall received letters from the Texas Natural Resource Conservation Commission ("TNRCC") requesting that it take some actions at the properties, there was no state enforcement action, nor any judicially or administratively approved settlement, requiring Aviall to conduct this clean-

up. App. 10a. After allegedly spending millions of dollars to investigate and remediate the properties, Aviall filed suit against Cooper in the United States District Court for the Northern District of Texas, seeking direct cost recovery under Section 107(a), contribution pursuant to CERCLA Section 113(f)(1), and other supplemental jurisdiction claims pursuant to Texas state law. App. 10a. Aviall subsequently amended its complaint to drop the Section 107(a) direct cost-recovery claim and add state law contribution claims under two Texas environmental statutes. App. 49a.

Cooper sought summary judgment because the express language of Section 113(f)(1) allows an action for contribution only "during or following" a civil action under CERCLA Sections 106 or 107, and Aviall was not, nor had it ever been, the subject of a Section 106 or 107 civil action. The district court agreed (App. 11a),[1] and on August 14, 2001, a divided panel of the Fifth Circuit affirmed, holding that a potentially responsible party ("PRP") "seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." App. 66a.

Aviall's petition for rehearing *en banc* was granted on December 19, 2001 (App. 46a), and a divided appeals court, sitting *en banc*, reversed. Focusing principally on Section 113(f)(1)'s "savings clause," which provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] . . . or section [107] of this title," the *en banc* majority held that this language defeated a reading of the provision's enabling clause that would restrict

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[1] In granting summary judgment, the district court declined to exercise supplemental jurisdiction over Aviall's state law claims. App. 99a.

Section 113(f)(1) contribution to situations "during or following" a Section 106 or 107 civil action. App. 33a. The full appellate court reversed and remanded the case to the district court. App. 33a. Three judges dissented, observing that the enabling clause, not the savings clause, contains the provision's operative language, and, because Aviall failed to satisfy the enabling clause's "during or following" requirement, its instant suit for contribution under Section 113(f)(1) should be dismissed. App. 34a-45a.

Cooper thereupon timely filed the present certiorari petition seeking review by this Court.

REASONS FOR GRANTING THE WRIT

This case involves an issue of recognized importance in both the public and private sectors. Its resolution has far-reaching implications for the administration of the scheme created by Congress to facilitate clean-up of sites contaminated by hazardous substances and to impose and allocate the costs of such clean-ups among those responsible for the contamination. The courts of appeals and the district courts have expressed divergent and conflicting views as to when and under what circumstances a private party may seek contribution from other parties for clean-up costs under CERCLA.

While the Fifth Circuit here is the first federal appeals court to have ruled directly on the interplay between Section 113(f)(1)'s enabling and savings clauses, other circuits have addressed the availability of contribution under this provision of CERCLA in related circumstances, and have offered contradictory understandings of what Congress intended. The United States, which has principal responsibility for the administration and enforcement of CERCLA, submitted an

amicus curiae brief in response to a request from the *en banc* court. The decision issued by the *en banc* majority is directly contrary to the position taken by the United States. Disagreement over the scope of Section 113(f)(1) pervades the federal district courts as well. A definitive ruling from this Court is, therefore, needed to reconcile these disparate and competing views on this important issue of statutory interpretation, and thereby remove the existing confusion over when and under what circumstances the federal right of contribution in Section 113(f)(1) is available.

A. The Fifth Circuit's Interpretation of Section 113(f)(1) Contradicts The Statute's Language, Its Essential Purpose, And Its Overall Structure

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") added Section 113(f)(1) to CERCLA to provide, in explicit terms, as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in

> the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

Before the 1986 amendments, CERCLA contained no express right of contribution between or among persons responsible for, or holding an ownership interest in, contaminated facilities or property.[2] Most early lower court decisions, however, held that Section 107 embraced an implied right of contribution where the government had asserted a cost-recovery action under Section 107(a), seeking to impose joint and several liability.[3] Yet this Court's precedent in other contexts raised doubts as to whether an implied right of contribution could be judicially fashioned from federal statutes that did not expressly provide for such a right. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91-95 (1981).

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[2] The four categories of "covered persons" include: (1) current owners and operators of vessels or facilities where hazardous substances were disposed of; (2) past owners or operators of any such facilities; (3) persons who arranged for transport for disposal or treatment of hazardous substances; and (4) persons who accepted any such substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a).

[3] *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y. 1986); *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986); *United States v. Ward*, 1984 U.S. Dist. LEXIS 16774 (E.D.N.C. May 11, 1984); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162 (W.D. Mo. 1986); *United States v. Medley*, 1986 U.S. Dist. LEXIS 23365 (D.S.C. July 1, 1986); *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *Mola Dev. Corp. v. United States*, 1985 U.S. Dist. LEXIS 22674 (C.D. Cal. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

Congress' response, through SARA, was to add Section 113(f) so as to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties. . . ." S. Rep. No. 99-11, at 44 (1985), *reprinted in* 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986, at 636 (1990).

1. The Fifth Circuit Majority's Interpretation of Section 113(f)(1) Contradicts CERCLA's Statutory Language

The first sentence of Section 113(f)(1) contains its operative enabling clause, which states that any person wishing to seek contribution under that provision "may" do so "during or following any civil action under section [106] or . . . section [107(a)] . . . ." 42 U.S.C. § 9613(f)(1). According to the *en banc* majority, the word "may" is to be understood as permissive rather than mandatory, providing "a statement of non-exclusive circumstances in which actions for contribution may be brought." App. 25a. Under this interpretation, Section 113(f)(1) would not preclude private suits for contribution initiated *before* commencement of a civil action under Section 106 or Section 107 against the initiating party. *Id.* The dissent countered that, precisely because the first sentence of Section 113(f)(1) contained enabling language -- *i.e.*, creating a substantive right of contribution -- its "during or following" clause described the *only* circumstances, under traditional standards of statutory construction, in which a Section 113(f)(1) right of contribution "may" be asserted. App. 35a.

This latter understanding of Section 113(f)(1)'s enabling clause enjoys far greater authoritative support. The provision's "during or following" constraint is set forth, both

explicitly and emphatically. Under one of the most basic canons of statutory interpretation -- *expressio unius est exclusio alterius* -- such a clear expression of coverage indicates that all else was intentionally excluded. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23 at 306-07; *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (*expressio unius* principle bars judiciary from reading a heightened pleading requirement into federal rules). Moreover, this more restrictive view of the provision's enabling clause -- as declaring what a party may or may not do in pursuit of federal CERCLA contribution -- is fully consistent with the contemporary definition of "may." *See* WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) (in proper context, "may" can denote exclusivity, meaning "shall [or] must. . . ."). Relevant case law also demands that the word "may," in circumstances not unlike those here, is to be understood to have preclusive effect. *See Federal Deposit Ins. Corp. v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994) (statute providing that financial institution official "may" be held liable for gross negligence interpreted as providing exclusive circumstances where liability could be found); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993) (same). The Fifth Circuit's contrary reading, while arguably finding refuge in an alternative dictionary definition assigned to the term if lifted from text and context,[4] runs directly counter to the common usage of the word "may" as generally understood in this context. *See Bates*, 42 F.3d at 371; *Gallagher*, 10 F.3d at 420.

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[4] Webster Third New International Dictionary includes an alternative definition of the word "may" as meaning "have liberty to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993).

The overall design of Section 113(f)(1) further reinforces this conclusion. Section 113(f)(1)'s second sentence, fairly read, indicates that Congress intended the express right of contribution in its enabling clause to describe the sole substantive right being created. That sentence commands, emphatically, that any Section 113(f)(1) contribution claim "*shall* be brought in accordance with this section" -- *i.e.*, "during or following any civil action under section [106] . . . or under section [107(a)] . . . ." -- and "*shall* be governed by Federal law." 42 U.S.C. § 9613(f)(1) (emphasis added). This last reference is to the federal common law which largely prompted passage of Section 113(f)(1), and which allowed only those joint tortfeasors who were the subjects of pending or concluded actions to seek contribution -- the very result that the "during or following" restriction included in Section 113(f)(1)'s first sentence serves to accomplish.

The provision's third sentence compels the same reading of the enabling clause. It speaks to the method of "allocat[ing] response costs" in resolving the aforesaid contribution claims, an allocation which the statute clearly provides is to be made "among liable parties." 42 U.S.C. § 9613(f)(1). The enabling clause's "during or following" requirement ensures that the private party seeking contribution is, in fact, a "liable part[y]." *Id.* It is, of course, that party's burden to show that those from whom it seeks contribution are also "liable parties." *Id.*; *see Crofton Ventures L.P. v. G&H*, 258 F.3d 292, 300 (4th Cir. 2001). Yet, the Fifth Circuit casts aside this "shared liability" principle that was, at the time of enactment, firmly embedded in the federal common law of contribution, *see Northwest Airlines*, 451 U.S. at 87, and that is embraced by the statute's operative language. *See* discussion at pp. 18-21, *infra*.

statute's savings clause thus ensured that all such other rights of action for contribution, whether state or federal, would remain unaffected and unaltered by enactment of the express right of contribution in Section 113(f)(1).

It is difficult to imagine that Congress could have intended otherwise. Having enacted Section 113(f)(1) for the express purpose of creating an explicit federal right of contribution, Congress hardly expected the new statute's language to be read as creating the very uncertainty that the amendment was enacted to eliminate.[7] The Fifth Circuit, however, has judicially constructed this very result by reading the savings clause to *expand* the contribution right expressly granted in Section 113(f)(1). Specifically, the majority below understands the statute's clear command that "[n]othing in this subsection shall diminish" other existing rights of contribution as *an intended enlargement* of the enabling clause itself. This interpretation effectively authorizes contribution actions both under Section 113(f)(1)'s savings clause, where suit could be brought by a party who has never been the subject of a Section 106 or Section 107(a) civil action, *and* under its enabling clause, where a party may seek contribution only "during or

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proper subject for a Section 113(f)(3)(B) contribution action, notwithstanding that the "during or following" limitation in Section 113(f)(1) had not been satisfied. This is so because, under Section 113(f)(1)'s savings clause, nothing in Section 113(f)(1) is to be construed as diminishing the separate federal right of action for contribution under Section 113(f)(3)(B). Notably, Aviall asserted no right to contribution under Section 113(f)(3)(B) in this action, nor was it in a position to do so.

[7] *See* H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (Section 113(f)(1) was intended to "confirm" the decisions of those federal courts that had implied a right of contribution under CERCLA); 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford, predicting that Section 113 would "remove[] any doubt" as to contribution right).

following" its involvement as the subject of such a civil action. App. 14a ("Section 113(f)(1) *authorizes* suits against FRPs in both its first and last sentence . . . ") (emphasis added).

Certainly, the careful wording of the enabling clause itself supports no such conclusion. Nor do the words of the savings clause, which on their own terms create nothing; they simply preserve, undiminished, whatever *other* contribution rights exist elsewhere. *Atherton*, 519 U.S. at 228. *See also United States v. Locke*, 529 U.S. 89, 105 (2000) (a savings clause creates no substantive rights of its own, operating only to preserve rights existing otherwise and elsewhere). Indeed, precisely because the savings clause was unmistakably aimed at preserving any contribution action that might be otherwise available to a private party (whether under Section 113(f)(3)(B) or under state law), to create out of the "savings" language a new and independent Section 113(f)(1) right of action for contribution that ignores the explicit restrictions of the provision's enabling clause defies every recognized principle of statutory construction. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (general savings clause will not be read to override specific provisions of statute); *Northwest Airlines*, 451 U.S. at 91-92 (right of contribution will not be implied where statute creates explicit damages action without contribution right); *Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332, 340-41 (1994) (statutes should not be read to render other provisions in the same enactment inoperative) (*citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). This Court has specifically admonished that a savings clause should not be read to override or negate a statute's enabling clause. *Morales*, 504 U.S. at 384 (savings clause will not be interpreted to render specific provisions inoperative); *International Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987) (declining to undermine

statute by application of general savings clause).[8] Yet, that is undeniably the effect of the Fifth Circuit's ruling here.

2. The Fifth Circuit's Interpretation of Section 113(f)(1) Contradicts The Statute's Essential Purpose

Congress passed Section 113(f)(1) to make explicit the pre-SARA implied right of contribution, as found in federal common law, by permitting parties subject to cost recovery actions under Section 106 or 107 to implead or bring separate actions against third parties potentially responsible for the contamination.[9] As expressed in the House Report accompanying the SARA amendments:

> This section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties when the person believes that it has assumed a share of the clean-up or cost that may be greater than its equitable share under the circumstances.

H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2861 (emphasis added).[10]

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[8] To the extent the Fifth Circuit seems to have found the enabling clause to be in conflict with the savings clause, principles of statutory construction dictate that the savings clause -- not the enabling clause -- would be invalidated. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47.12 (6th ed. 2000).

[9] *See* notes 3 and 7, *supra*.

[10] While legislative history must be used cautiously in trying to discern the Congressional intent behind the language of a statute, Congress' design, object, and policy is certainly a helpful aid in determining the statute's meaning. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

At the time of SARA's enactment, every case finding an implied right of contribution arose in the context of a pending or concluded suit brought by federal or state governments under Section 106 or 107. *See* note 3, *supra*. Underlying Section 107 suits were, in fact, the context for the two cases explicitly mentioned in the House Report accompanying the language that eventually became Section 113(f)(1):

> It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA, *United States v. Ward*, 8 Chem. & Rad. Waste Litg. Rep. 484, 487-88 (D.N.C. May 14, 1984). Other courts have recognized that a right to contribution exists without squarely addressing the issue. *See, e.g., United States v. South Carolina Recycling & Disposal, Inc.*, 7 Chem. & Rad. Waste Litig. Rep. 674, 677 (D.S.C. February 23, 1984). This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties when the person believes that it has assumed a share of the clean-up or costs that may be greater than its equitable share under the circumstances.

See H. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2861.[11]

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[11] In contrast, the cases cited by the Fifth Circuit for the proposition that other federal decisions allowed actions for recovery "in the nature of contribution" to proceed even though the plaintiff had not been sued

It is against this backdrop that the House Report describes Congress' goals for the new provision in the following terms:

> The section contemplates that *if an action under section 106 or 107 of the Act is under way*, any related claims for contribution or indemnification may be brought in such an action. This provision should also encourage private party settlements and cleanup since the actuality of being brought into litigation as a third-party defendant, concurrent with the original litigation, has the effect of bringing all such responsible parties to the bargaining table at an early date. In addition, this provision will lessen any ill will that is created between the government and the original defendants selected by the government for naming in the original suit. *This provision allows all counterclaims, cross-claims and third-party*

under § 106 or § 107, *see, e.g.*, *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*,, 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982), do not even address "contribution." They involve, instead, covered persons who sought direct recovery of their costs -- not contribution -- from parties actually responsible for the contamination. While the Fifth Circuit pretends that "[w]hether the cases actually used the word 'contribution' is irrelevant" (App. 17a), Congress' concern was not with these direct-action decisions under Section 107(a), which were nowhere referenced in the legislative history, but rather with the separate line of cases cited in note 3, *supra*, that found an implied *right of contribution* under Section 107. See H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2861. The new Section 113(f)(1) made explicit this implied Section 107 right of contribution, exercisable (as with the implied right) by parties subject to, or who had been subject to, Section 106 or 107 CERCLA liability. 42 U.S.C. § 9613(f)(1).

> *actions to be dealt with in a single action if the court is so inclined.*

H. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2862 (emphasis added).

The relationship between Sections 107 and 113 has been fully recognized as important to understanding the express right of contribution added to the statute in Section 113(f)(1). Indeed, this Court has observed that the two sections work together to effectuate the right of a liable party (or of one facing liability) to claim contribution from others who also contributed to the contamination. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (as amended by SARA, CERCLA "now expressly authorizes a cause of action for contribution in § 113" and "impliedly authorizes a similar and somewhat overlapping remedy in § 107").[12] As already indicated (*see* note11, *supra*), the new Section 113(f)(1) was but a codification of the contribution

[12] Where, for example, an "innocent" landowner *is subjected to CERCLA liability claims*, it may bring either a direct cost recovery claim against another responsible party under Section 107 seeking to impose joint and several liability, *see Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997), or, alternatively, it may pursue contribution under Section 113(f)(1). This is to be distinguished from the "innocent" landowner, who, if *not subject to CERCLA liability claims*, can bring *only* a direct cost recovery action under Section 107(a), and is not in a position to pursue contribution under Section 113(f)(1). *See, e.g., Rumpke*, 107 F.3d at 1241; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996). Aviall is not an "innocent" landowner, having contributed to the contamination of the property (App. 10a), and thus it cannot pursue a direct cost recovery action under Section 107(a). It, moreover, has never been the subject of a Section 106 or 107 civil action, and thus can assert no right of contribution under Section 113(f)(1). *And see* n.6, *supra*. Aviall's state claims for contribution under Texas law were "saved," however, under Section 113(f)(1)'s savings clause.

right that had previously been, in the case law, implied under and tied to the liability provision found in Section 107. Not even the Fifth Circuit majority disputes this interplay between the two provisions. App. 18a-19a. It simply fails to follow the connection through to its necessary conclusion. For Section 113(f)(1) to work as a "stand-alone" contribution statute, as the Fifth Circuit concludes, that provision would have to establish liability on its own -- *i.e.*, without Section 107(a). It does not do so. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 116, 1122 (3d Cir. 1997) ("section 113 does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs],"); *accord Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997).

Nor can the construction of Section 113(f)(1)'s savings clause to create a stand-alone right of contribution be squared with the federal common law. Congress undeniably understood the right of contribution to be based on a common law concept of shared liability among joint tortfeasors, and it intended Section 113(f)(1) to codify that common law.[13] *See United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994); *see also* pp. 14-15, *supra*. At federal common law, one could not seek contribution unless and until that person had first discharged, by reason of judgment or settlement, the liability of other wrongdoer(s) against whom contribution is being sought. *See Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 298 (1993) (only those "charged with liability" in a common law suit for contribution under securities laws had a right to

[13] The House Report fully anticipates that "[a]s with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law." H. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2862.

contribution); *Texas Indus.*, 451 U.S. at 634 (characterizing contribution as helping "one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim"); *Northwest Airlines*, 451 U.S. at 87-88 (right to contribution "is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.")

That understanding was carried forward in the Restatements. *See* RESTATEMENT (SECOND) OF TORTS, § 886A (1979); *and see* RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 23, cmt. b (2000) ("[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment").[14] Only recently was the Restatement modified in conformance with Section 113(f)(1) to allow a person to sue for contribution *during* the pendency of an underlying action, as well as *after* a judgment or settlement regarding liability. *See* RESTATEMENT (THIRD) OF TORTS, § 23, cmts. b, n. (2000); *see also* Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 194 (1996).

The federal right of action that the Fifth Circuit creates from Section 113(f)(1)'s savings clause wrenches the right of contribution from its common law moorings. Persons under no obligation to make a payment based on an impending judgment or settlement, and thus heretofore

[14] *See also* BLACK'S LAW DICTIONARY 328 (6th ed. 1990); ("Under principle of 'contribution,' a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff"); *id.* at 329 (7th ed. 1999).

unable to seek contribution, are, under the decision below, now nonetheless free to pursue contribution from others in federal court. Thus, removed from the right of contribution is what has long been regarded as one of its essential elements. *See* 18 AM. JR. 2D Contribution § 15 (1985) (one is entitled to contribution if the payment made by him was compulsory -- *i.e.*, "the party making it cannot legally resist it" -- under a legal and fixed obligation); RESTATEMENT (SECOND) OF TORTS, § 886A, cmt. e ("before there can be contribution between joint tortfeasors there must first of all be joint tortfeasors"); *see also Northwest Airlines*, 451 U.S. at 83 (two principal elements of common law right to contribution are "(1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award").

Traditionally, one who makes a voluntary payment cannot seek reimbursement from others by way of contribution, but has only a direct action for recovery of amounts owed. *See* 18 AM. JR. 2D Contribution § 15; RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e (1979) (equity rule provides that contribution "will not be allowed in favor of a volunteer").[15] The reading of Section 113(f)(1) advanced below changes all that. It affords Aviall a right of contribution it did not have at federal common law.[16] To the extent Congress intended so dramatic an overhaul of the

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[15] As previously noted, *see* note 12, *supra*, decisions following SARA continue to recognize that a landowner uninvolved in contaminating the property, who voluntarily pays clean-up costs, can bring a direct action under Section 107(a) against the responsible parties, but does not have a Section 113(f)(1) contribution suit. *See, e.g. Rumpke*, 107 F.3d at 1241.

[16] Similarly, the contribution right afforded Aviall by the Fifth Circuit's construction of Section 113(f)(1) -- as providing a free-standing right of action wholly detached from Section 107 liability – was unavailable prior to SARA even as an implied right.

federal common law, it was required to do so explicitly. Failing such explicit action, this Court has admonished strongly against judicial endorsement of rewriting federal common law by implication. *See United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

Indeed, in *Bestfoods*, this Court declined to read into CERCLA Section 107 an implied liability for the parent corporation of a PRP that would depart from the common law rule against piercing of the corporate veil. As there explained: "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law . . . .'" *Id.* (*quoting United States v. Texas*, 507 U.S. 529, 534 (1993)). *See also Key Tronic*, 511 U.S. at 809 (rejecting implied right under CERCLA to collect attorneys' fees); *Musick, Peeler & Garrett*, 508 U.S. at 293-96 (court has only "limited" discretion to imply contribution right based on judicially-fashioned implied private right of action under securities laws). Here, too, if the federal common law of contribution is to be altered so dramatically, that task properly falls to Congress to accomplish through explicit statutory language, not to the Fifth Circuit through an overly broad construction of a "savings clause" appearing in Section 113(f)(1) of CERCLA.

3. The Fifth Circuit's Interpretation Of Section 113(f)(1) Undermines CERCLA's Overall Structure And Scheme

CERCLA's overall contribution scheme is disserved by the strained interpretation offered by the court below. For example, Congress specifically addressed the applicable

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limitations period for pursuing a right of contribution in Section 113(g)(3). This provision establishes a period of three years *from the date of judgment or settlement* of a Section 106 or Section 107(a) action. 42 U.S.C. § 9613(g)(3).[17] In contrast, CERCLA contains no limitations period for federal contribution suits that proceed independent of such settlements or judgments. While some courts, and the *en banc* majority below (App. 30a), suggest that the six-year statute of limitations established by Section 113(g)(2) for Section 107(a) cost recovery suits can be borrowed in such circumstances,[18] *see, e.g.*, *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 355 (6th Cir. 1998); *Sun Co., Inc. v. Browning-Ferris, Inc.* 124 F.3d 1187, 1192-93 (10th Cir. 1997), this is not the limitations period prescribed by Congress for federal contribution actions, nor the one contemplated by the

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[17] Section 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). This language also applies to contribution suits brought under Section 113(f)(3)(B), with the three years running from the date of the triggering settlement with the government entered into pursuant to CERCLA Section 122, 42 U.S.C. § 9622.

[18] Section 113(g)(2) provides: "[a]n initial action for recovery of the costs referred to in section [107] of this title must be commenced (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . ." 42 U.S.C. § 9613(g)(2)(B).

statutory scheme that Congress devised for these purposes. If the Fifth Circuit decision is allowed to stand, the discrepancy as to when a Section 113(f)(1) contribution action must commence will persist. Those suits seeking contribution under the express enabling clause will be held to a three-year statute of limitations, while those "brought" under the savings clause will presumably enjoy a more lenient six-year statute of limitations. Nothing in SARA's history or text remotely suggests that Congress intended such disparity.

Allowance of Section 113(f)(1) contribution actions in the absence of a pending or concluded civil action under Section 106 or 107 also undermines Section 113(f)'s "comprehensive scheme" to favor early settlements in Section 106 and 107 suits. *See In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997); *United States v. Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996) (describing scheme). This scheme anticipates that when the federal government, or a state brings suit against one or more PRPs under Section 106 or 107, Section 113(f)(2) protects from future contribution claims those parties who settle early.[19] *In re Reading*, 115 F.3d at 1119. PRPs who do not settle are, on the other hand, subject to potentially disproportionate liability, as they cannot seek contribution from the settling parties. *Id.*; *see also United Tech. Corp.*, 33 F.3d at 103. Section 113(f) was thus "'designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.'" *United Tech. Corp.*, 33 F.3d at 103 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990)); *see*

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[19] Section 113(f)(2) provides, in pertinent part: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide . . . ." 42 U.S.C. § 9613(f)(2).

also H.R. Rep. No. 99-253(I), *reprinted in* 1986 U.S.C.C.A.N. at 2862.

Yet, by allowing a private party to bring a Section 113(f)(1) contribution action in the absence of an underlying Section 106 or Section 107 civil action, the Fifth Circuit exposes defendants named in the private suit to the very real prospect of multiple and possibly inconsistent liability claims should the government (or an innocent landowner) thereafter initiate a Section 106 or Section 107 suit against any or all of them.[20] Not only does such an unbridled construction of Section 113(f)(1)'s "savings clause" seriously undermine CERCLA's objective to have clean-up costs appropriately allocated among joint tortfeasors, *see United Tech. Corp.*, 33 F.3d at 102-03, but also it takes out of play the "contribution protection" that Section 113(f)(2) was intended to afford liable parties upon settlement of a suit under the enabling clause.[21]

This is much the same reasoning that caused concern to the First and Third Circuit Courts of Appeals in determining that a party responsible for contamination cannot assert a private Section 107(a) cost-recovery action against

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20 For example, a defendant alleged to be liable for only a portion of the clean-up costs in a contribution suit brought pursuant to Section 113(f)(1)'s savings clause, could also be alleged to be jointly and severally liable -- *i.e.*, liable for the entire clean-up costs -- in a later suit by the government. The government in the later suit could also assert that the clean-up for which contribution had been sought and obtained in the private "savings clause" action was in some respects deficient or inadequate, and pursue duplicative costs to repeat the initial work that was poorly done by another party.

21 Similarly, Section 113(f)(3)(B), which provides for a right of contribution only after settlement of an action brought by the government, *see* note 6, *supra*, is undermined by the Fifth Circuit's creation of a stand-alone right of contribution in the savings clause.

other responsible parties, but must proceed under Section 113(f)(1)'s contribution provision.[22] In *In re Reading*, 115 F.3d at 1119, the Third Circuit observed:

> [i]f a party could end run § 113(f)(2) and (3) by suing a settling party under § 107(a)(4)(B) for "costs of response," the settlement scheme would be bypassed. The incentive to early settlement would disappear, and the extent of litigation involved in a CERCLA case would increase dramatically. Consent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses.

See also United Tech. Corp., 33 F.3d at 103 (settlement-encouraging mechanism would be "gutted" by allowing private parties who contributed to the contamination to maintain Section 107(a) cost recovery actions against other potentially responsible parties prior to any government assessment of CERCLA liability). As the dissent below noted (App. 41a n.41), the Fifth Circuit's allowance of a private suit for contribution under Section 113(f)(1)'s savings clause, with no regard for the plaintiff's CERCLA liability, is equally disruptive of the statute's overall settlement scheme.

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22 Every court of appeals considering the issue, including the Fifth Circuit, has held that parties who contribute to the property contamination (like Aviall) are prohibited from pursuing direct cost recovery claims under Section 107(a). *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998), and cases cited therein; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989).

B. Both the Federal Circuits and Federal District Courts Have Expressed Differing and Conflicting Interpretations of Section 113(f)(1)

While the Fifth Circuit is alone in directly holding that the savings clause in Section 113(f)(1) overrides the provision's enabling clause, its understanding of the federal right of contribution created by Section 113(f)(1) squarely conflicts with the Seventh Circuit's understanding of the statute. In *Rumpke*, 107 F.3d at 1241, the Seventh Circuit considered, on the one hand, the availability of a Section 113(f)(1) contribution action to a party uninvolved in polluting the contaminated property, and, on the other hand, the extent to which those who did pollute were insulated under Section 113(f)(2), 42 U.S.C. § 9613(f)(2), from third-party claims of contribution by virtue of having reached an earlier clean-up settlement with the government. While concluding that a Section 113(f)(1) contribution action was available only to those who themselves contributed to the contamination, and against those polluters who had not yet entered into a federal or state clean-up settlement as to the specific property in question, the Seventh Circuit observed, directly contrary to the Fifth Circuit, that "a § 106 or a § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires . . . ." *Rumpke*, 107 F.3d at 1241.

The First Circuit has also expressed a view of the statute seemingly contrary to that of the Fifth Circuit, holding in *Hemingway Transport, Inc.*, 993 F.2d 915, 931 (1st Cir. 1993), that the savings clause in Section 113(f)(1) merely "saved" what was otherwise available -- namely, an implied right under Section 107 for a plaintiff who had incurred clean-up costs pursuant to a Section 106 EPA administrative order -- but did not expand the right of contribution beyond

what was found in the enabling clause. Both the Sixth and Tenth Circuits, on the other hand, have allowed Section 113(f)(1) contribution actions in circumstances like those in the First Circuit (where parties were acting in response to a Section 106 EPA administrative order and no Section 106 or 107 civil action had been commenced or concluded), by permitting a "free standing" federal right of contribution, as did the Fifth Circuit here. *Compare Centerior Serv.*, 153 F.3d at 352 (6th Cir.) *with Sun Co.*, 124 F.3d at 1192-93 (10th Cir.).

When and under what circumstances Section 113(f)(1) permits the filing of an action for federal contribution has sharply divided the federal district courts as well. Some have read Section 113(f)(1)'s saving clause as independently creating a right of contribution in the absence of a Section 106 or Section 107 civil action, applying reasoning similar to the *en banc* majority below. *See Coastline Terminals, Inc. v. USX Corp.*, 156 F. Supp. 2d 203 (D. Conn. 2001); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684 (N.D. Ind. 1997); *Johnson County. Airport Comm'n v. Parsonitt Co.* 916 F. Supp. 1090 (D. Kan. 1996); *Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575 (D. Conn. 1994); *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971 (N.D. Ga. 1991). Others have read Section 113(f)(1) as creating only a limited right of contribution, as did the Seventh Circuit, finding the language in the provision's enabling clause to be controlling. *See Deby, Inc. v. Cooper Indus.*, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000); *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339 (D.N.J. 1999); *Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983 (C.D. Ill. 1998); *Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co.*, No. 1:92CV80087, 1992 U.S. Dist. LEXIS 22647, at *10 (N.D. Ohio May 21, 1992); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988). Accordingly, there is a need for this Court

to grant certiorari to resolve the clear disagreement in the lower federal courts over the proper interpretation of CERCLA's Section 113(f)(1).

How this issue is ultimately decided will determine the extent to which CERCLA's federal right of contribution effects a broad preemption of state contribution rights, as suggested by the Fifth Circuit's decision, or more narrowly preempts state rights of contribution, as expressed by the Seventh Circuit. Under the approach taken by the Fifth Circuit, an expansive application of the savings clause in Section 113(f)(1) will necessarily occupy the field, preempting the very state law contribution claims that the clause was intended to save. By contrast, a reading of Section 113(f)(1) that limits the federal right of contribution to suits brought "during or following" Section 106 or Section 107 civil actions would, as the Seventh Circuit has recognized, preempt only those state rights of contribution in direct conflict with that federal right, but would not otherwise interfere with a party's right to pursue contribution under state law. *See PMC v. Sherwin Williams, Co.*, 151 F.3d 610, 617-18 (7th Cir. 1998) (Section 113(f)(1) preempted Illinois contribution statute insofar as the state statute would have nullified CERCLA's requirement of consistency with the National Contingency Plan). Similar decisions have been issued by the Second and Third Circuits. *Bedford Affiliates v. Sills*, 156 F.3d 416, 425-27 (2d Cir. 1998) (Section 113(f) preemption is limited to those common law restitution and indemnification actions that would allow bypass of CERCLA's scheme favoring settlements); *In re Reading*, 115 F.3d at 1119-20 (same).

The current confusion in the federal circuits as to whether to apply a three-year (42 U.S.C. § 9613(g)(3)) or six-year (42 U.S.C. § 9613(g)(2)) statute of limitations to the federal right of contribution also argues for this Court to

grant the petition to decide the issue presented. *Compare United Tech. Corp.*, 33 F.3d at 103 (three years) *with Sun Co*, 124 F.3d at 1192 (six years). *See also* pp. 21-23, *supra*.

The decision below wrongly decides an issue of statutory construction in a manner that greatly expands the right of contribution available under Section 113(f)(1) of CERCLA beyond the statute's clear language and intended purpose. It is diametrically opposed to the United States' interpretation of this important federal statute, which the Fifth Circuit solicited and then wholly disregarded. The Seventh Circuit reads Section 113(f)(1) as does the statute's principal enforcer – a reading which the First Circuit appears to share, but perhaps not the Sixth and Tenth Circuits. Other lower federal courts are irreconcilably split on the issue. Resolution by this Court is thus needed to definitively decide when and under what circumstances the federal right of contribution is available under CERCLA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2003

APPENDIX

STATUTORY PROVISIONS

42 U.S.C. § 9606. ABATEMENT ACTIONS

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

* * *

42 U.S.C. § 9607. LIABILITY

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date.

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses.

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement

arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

* * *

42 U.S.C. § 9613. CIVIL PROCEEDINGS

* * *

(f) Contribution.

(1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement.

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the

State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred tc in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought.

(1) Actions for natural resource damages. Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and

maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before Oct. 17, 1986.

(2) Actions for recovery of costs. An initial action for recovery of the costs referred to in section 9607of this title must be commenced —

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section

9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after —

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10197

AVIALL SERVICES, INC.,

Plaintiff-Counterdefendant-Appellant,

versus

COOPER INDUSTRIES, INC.,

Defendant-Counterclaimant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

November 14, 2002

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, and DENNIS, Circuit Judges.[1]

EDITH H. JONES, Circuit Judge:

The question presented in this case is whether § 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") allows a

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[1] Judge Clement is recused and did not participate in the decision. Judge Parker retired before the case was decided.

"potentially responsible party (PRP) to seek contribution from other PRPs for environmental cleanup costs when no civil action has been brought under CERCLA §§ 106 or 107(a)." *See* 42 U.S.C. §§ 9606, 9607(a), 9613(f)(1) (2000) (hereinafter, citations are to sections of CERCLA). We hold, contrary to the panel majority whose opinion generated this en banc proceeding, that it does.

BACKGROUND

Appellant Aviall Services, Inc., purchased from appellee Cooper Industries, Inc. property in Dallas, Texas, that was contaminated with various hazardous substances. After prodding from the Texas Natural Resource Conservation Commission (TNRCC), Aviall began cleaning up the property.[2] The federal Environmental Protection Agency (EPA) never contacted Aviall or designated the property as contaminated. To recover some of the millions of dollars it had incurred in cleanup expenses, Aviall sued Cooper in the district court seeking contribution under CERCLA and damages under state law theories. Cooper filed counterclaims. Both Cooper and Aviall concede that they are PRPs under CERCLA because they contributed to the contamination of the property. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 137 (5th Cir. 2001).

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2 The TNRCC sent letters instructing Aviall to undertake various investigation and remediation activities. The first such letter, styled a "Corrective Action Directive," contained a detailed list of required activities. Two later letters cited alleged violations of regulations and statutory provisions and indicated that enforcement action would be sought "[i]f you fail to adequately respond." A fourth letter promised enforcement action if Aviall failed to pursue one of two suggested remediation options.

Holding that Aviall could not yet assert a claim for contribution under CERCLA because it had not been subjected to an action under §§ 106 or 107(a), the district court granted summary judgment for Cooper on Aviall's CERCLA claim, dismissed it without prejudice, and declined to exercise supplemental jurisdiction over the parties' state law claims. Aviall appealed.

A divided panel of this court affirmed, holding that "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." *Aviall Servs., Inc.*, 263 F.3d at 145. For this conclusion, the panel majority relied primarily on its textual interpretation of § 113(f)(1) of CERCLA, which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1) (2000). The panel read the first sentence of § 113(f)(1) to "require[] a PRP seeking contribution from other PRPs to have filed a § 113(f)(1)

claim 'during or following' a federal CERCLA action against it." *Aviall Servs., Inc.*, 263 F.3d at 138. The term "contribution" was understood to "require[] a tortfeasor to first face judgment before it can seek contribution from other parties," *id.*, and the term "may" in the first sentence of § 113(f)(1) was viewed by the majority as creating "an exclusive cause of action and mean[ing] 'shall' or 'must.'" *Id.* at 138-39. *Compare Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994). As for the final sentence of § 113(f)(1) — sometimes referred to as the "savings clause" — the panel read this "to mean that the statute does not affect a party's ability to bring contribution actions based on *state* law." *Id.* at 139. (Emphasis in original). The panel majority believed that interpreting the savings clause "to allow contribution suits, regardless of whether the parties are CERCLA defendants in a § 106 or § 107(a) action," would "render superfluous the first sentence of § 113(f)(1), the enabling clause," *id.*, and thus, would violate the canon of statutory construction that a specific provision governs over a general provision. *Id.* at 140.

Judge Wiener dissented, furnishing the alternative interpretation of § 113(f)(1) that we adopt here and pointing out that the great majority of circuit courts implicitly reject the panel majority's conclusion.

Because of the importance of this question to the allocation of financial responsibility for CERCLA cleanups, we granted Aviall's petition for en banc rehearing.

DISCUSSION

Statutory construction begins with the plain language of a statute, but "plain" does not always mean "indisputable" or "pellucid." Consequently, sound interpretation reconciles the text of a disputed provision with the structure of the law

of which it is a part; may draw strength from the history of enactment of the provision; and acknowledges the legislature's general policies so that the interpretation does not become absurd.[3]

Reasonable minds can differ over the interpretation of section 113(f)(1), because its syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous. Using the above tools, however, we adopt what we consider the most reasonable interpretation of the provision. To facilitate the discussion, we first state the preferred interpretation and compare it briefly with the interpretation advocated by the panel majority. Prefatory to defending our interpretation, a review of the statutory and decisional background leading to the passage of § 113(f) will be helpful.

The en banc majority concludes that section 113(f)(1) does not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only "during or following" litigation commenced under sections 106 or 107(a) of CERCLA. Instead, a PRP may sue at any time for

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3 *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 440 (5th Cir. 2000) (stating that use of legislative history is appropriate where statutory text is "opaque," "translucent," or "ambiguous"), *cert. denied*, 532 U.S. 971 (2001); *United States v. A Female Juvenile*, 103 F.3d 14, 16-17 (5th Cir. 1996) ("Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result."); *In re Timbers of Inwood Forest Assocs., Ltd.*, 793 F.2d 1380, 1384 (5th Cir. 1986) ("Each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.").

contribution under federal law to recover costs it has incurred in remediating a CERCLA site. Section 113(f)(1) authorizes suits against PRPs in both its first and last sentence which states without qualification that "nothing" in the section shall "diminish" any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action.

The dissent's narrow textual interpretation is flawed for several reasons.[4] Regarding the first sentence, it focuses unduly on the phrase "during or following," and it implicitly interprets "civil action" to include administrative remedial orders only when the government files suit to enforce them in federal court. It narrows the last sentence arbitrarily and without textual support to the preservation of state law contribution claims. Finally, the dissent's interpretation distorts the interplay of the first and last sentences and fails to make sense against the background of caselaw and other interpretive guideposts.

I. BACKGROUND — WHY SECTION 113(F) WAS NEEDED

CERCLA was enacted in 1980 to establish a means of controlling and financing governmental and private cleanups of hazardous releases at abandoned and inactive waste disposal sites. CERCLA's twin purposes are to promote prompt and effective cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions created the hazards. *See, e.g., OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 1437 (2002). Under the statute, the EPA

4 The dissent modifies the panel majority's interpretation somewhat. This opinion responds only to the dissent.

possesses broad powers to remediate sites itself and require "covered persons" (PRPs) to reimburse the government's costs, and to compel PRPs to perform the cleanups by administrative order or court action. 42 U.S.C. §§ 9604, 9606(a) (2000). The definition of "covered persons" encompasses nearly all those who have or had contact with a particular site.[5] Further, every PRP is jointly and severally liable unless it can prove the specific amount of harm it caused. *See generally Bell Petroleum Servs. v. Sequa Corp.*, 3 F.3d 889, 894-902 (5th Cir. 1993) (applying principles of apportionment found in *Restatement (Second) of Torts* to CERCLA liability). These circumstances, together with the enormous costs of remediating hazardous waste sites, make the availability of contribution among PRPs all the more important for achieving the purposes of the statute — that those responsible for environmental damage to sites, not other parties, properly bear the costs of their actions, and that the sites are actually cleaned up.

As enacted, however, CERCLA contained no explicit provision allowing recovery through contribution. Federal courts soon began articulating a federal common law right of contribution to resolve claims among PRPs. The seminal decision is *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), in which the City of Philadelphia sued another PRP for cleanup costs. Neither the

5 The four classes of "covered persons" include (1) current owners and operators of vessels or facilities where hazardous substances were disposed of; (2) past owners or operators of any such facilities; (3) persons who arranged for transport for disposal or treatment of hazardous substances; and (4) persons who accepted any such substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a) (2000), 42 U.S.C. § 9607(a) (2000). While three defenses are enumerated in the statute, they are not routinely available to PRPs. *See* Susan M. Cooke and Christopher P. Davis, *The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation* § 13.01[5][c], at 13-70.17.

federal nor state governments had brought suit against the city under CERCLA, *id.* at 1143, and there is no indication in the opinion that the city had been sued or been the object of a CERCLA administrative cleanup order. The district court rejected the defendants' argument that because the city was subject to liability under the statute, it could not recover its cleanup costs from other responsible parties. *Id.* at 1141-42. *See also NL Indus., Inc. v. Kaplan*, 792 F.2d 896 (9th Cir. 1986) (what amounted to a CERCLA action for contribution allowed to proceed in absence of lawsuit or federal administrative action against the contribution plaintiff under sections 106 or 107); *Pinole Point Prop., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984) (plaintiff, itself a PRP, could seek recovery under CERCLA § 107(a)(4)(B) for its response costs where no governmental action had been taken).[6]

Several other published federal decisions allowed CERCLA actions for recovery in the nature of contribution to proceed even though the plaintiff had not been sued under § 106 or § 107.[7] In particular, this court held that prior

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6 *See Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (relying on *Stepan Chem. Co.* in concluding "that under 42 U.S.C. § 9607(a)(4)(B), a private party, even though a responsible party under CERCLA, who voluntarily pays CERCLA response costs may bring an action in its own behalf to collect cleanup costs against the parties allegedly responsible for the production and dumping of hazardous wastes").

7 *See, e.g., Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 889 (9th Cir. 1986) (state agencies required site owner to test waste substances; owner sued prior owner for costs incurred; action allowed to proceed; appeal decided on same day as *NL Indus., Inc.*); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074 (1st Cir. 1986); *City of New York v. Exxon Corp.*, 633 F. Supp. 609, 612-13, 615-18 (S.D.N.Y. 1986) (city, which owned and operated landfills, sued corporations that generated and transported wastes dumped at landfills; court denied motions to dismiss city's § 107 claims). *Cf. Cadillac*

government involvement was not a prerequisite to recoupment of § 107 response costs by one group of PRPs against other PRPs. *Tanglewood E. Homeowners Ass'n v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1575 (5th Cir. 1988). Whether the cases actually used the label "contribution" is irrelevant, as an action brought by a PRP for response costs against another PRP is inherently one for contribution.[8] And even if the first PRP recovers 100% of its costs from the second PRP, that does not makes its recovery any less a recovery in contribution.[9]

Fairview/California, Inc. v. Dow Chem. Co., 299 F.3d 1019, 1024 (9th Cir. 2002) (owner sued other PRPs in 1983 for damages to cover expenses of investigating soil pollution; no indication in opinion that owner was sued beforehand; prior opinion in case, rejecting argument that prior governmental action was required for owner's suit to proceed, states that testing activities were undertaken at request of state officials, 840 F.2d 691, 692-93 (9th Cir. 1988)); *Allied Towing Corp. v. Great E. Petroleum Corp.*, 642 F. Supp. 1339, 1347-1350, 1352 (E.D. Va. 1986) (plaintiff transporter of hazardous substance sued defendants for remedial costs arising from loading of substance onto plaintiff's barge; although concluding that complaint stated claim for cost recovery under CERCLA § 107, court granted at least two defendants' motion to dismiss § 107 claim on other grounds; unclear whether court dismissed claim as to other defendants).

8 *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2nd [sic] Cir. 1998); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) ("There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution."); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

9 *Cadillac Fairview/California, Inc.*, 299 F.3d at 1026 (no abuse of discretion for trial court to allocate 100% of contribution liability to defendant United States); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 549 (6th Cir. 2001) (no abuse of discretion for trial court to allocate total contribution liability to defendant); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 615-16

The Supreme Court expressly acknowledged this development of federal common law when it held that § 107 of CERCLA "impliedly authorizes" a cause of action for contribution. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816, 114 S. Ct. 1960, 1965-66 (1994) (citing *Stepan Chemical* and others of the foregoing cases). Ironically, the Court was in part responsible for Congress's enactment of an express statutory provision for contribution among PRPs. Decisions it rendered in the early 1980s, which were cited in the legislative history concerning § 113(f), had cast doubt on the ability of federal courts to fashion implied rights of contribution under federal statutes. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40, 101 S. Ct. 2061, 2066-67 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Amer.*, 451 U.S. 77, 91-95, 101 S. Ct. 1571, 1580-83, 67 L.Ed.2d 750 (1981).

Congress passed § 113(f) against this statutory and decisional background. First, a way had to be found to encourage cost-sharing among PRPs. Second, lower federal courts were implementing, albeit unevenly, contribution rights that did not depend on pre-existing EPA administrative orders and that did not arise solely "during or following" CERCLA enforcement actions. Third, the Supreme Court had cast doubt on the availability *vel non* of federal common law contribution claims, arguably including those under CERCLA. Section 113(f) was born as the "machinery" to govern and regulate actions for contribution, "providing the details and explicit recognition that were missing from the

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(7th Cir. 1998) (100% contribution award to plaintiff not an abuse of discretion even though plaintiff engaged in some dumping). *But cf. Bedford Affiliates*, 156 F.3d at 424 ("one potentially responsible person can never recover 100 percent of the response costs from others similarly situated since it is a joint tortfeasor — and not an innocent party — that ultimately must bear its pro rata share of cleanup costs under § 107(a)").

text of § 107." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997).[10] Section 113(f) was enacted as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

We conclude this section with a brief and cautious review of the legislative history of § 113(f). Legislative history should be consulted gingerly, if at all, in aid of statutory construction. *Boureslan v. ARAMCO*, 857 F.2d 1014, 1018 (5th Cir. 1988), *adopted en banc* **[sic]** 892 F.2d 1271 (5th Cir. 1990), *aff'd. sub nom. E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). Caution is even more necessary here, for CERCLA is notorious for vaguely drafted provisions and an inconclusive, if not contradictory, legislative history. *Bell Petroleum Servs.*, 3 F.3d at 901 n.13 (quoting *Amoco, Inc. v. Borden*, 889 F.2d 664, 667 (5th Cir. 1989)). Only a few general observations can be drawn from the available legislative history materials.

First, the avowed purpose of § 113(f)(1) was to give PRPs the "explicit right to sue" for contribution and to "confirm" the decisions of federal courts that had so construed CERCLA. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, at 59, 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841, 2861; S. Rep. No. 99-11, at 44 (1985).[11] *See also* 131 Cong.

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10 *See also Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (a § 113(f) contribution action "*is* an action for recovery of *the costs* referred to in § 107"); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924 (5th Cir. 2000) (same), *cert. denied*, 533 U.S. 950 (2001).

11 Both of these reports refer to earlier versions of § 113(f)(1) that differ from the enacted version in a number of respects, particularly in their keying of contribution to entry of a judgment, S. Rep. No. 99-11, at 90, or a "defendant alleged or held to be liable." [**"?**] H. R. Rep. No. 99-253, pt. III, at 18 (1995), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3041.

Rec. 24,450 (1985) (statement of Sen. Stafford (predicting that § 9613 would "remove[] any doubt as to the right of contribution")). *Cf.* William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 Notre Dame L. Rev. 193, 224-26 (1996).

Second, Congress emphasized in SARA that it had previously encouraged the federal courts to devise equitable solutions for apportioning waste site cleanup costs among numerous PRPs:

> No change has been made in the standard of liability that applies under CERCLA. . . . [L]iability under CERCLA is strict, that is, without regard to fault or willfulness. Where appropriate, liability under CERCLA is also joint and several, as a matter of federal common law.
>
> Explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of "traditional and evolving principles of common law" and pre-existing statutory law. *The courts have made substantial progress in doing so.* The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases.

Like the enacted version, both of the earlier versions contained "savings clauses.

H.R. Rep. No. 99-253, pt. I, at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (citations omitted) (emphasis added).[12] Another federal district court decision cited favorably in the legislative history expressly extends this common law process of development to contribution actions. *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 995 n.8 (D.S.C. 1984), *aff'd in part, vacated in part on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cited in* House Report No. 99-253, pt. I, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861, *and cited in* S. Rep. No. 99-11, at 44 (1985).[13]

Third, although snippets of the legislative history suggest that Congress intended to remove any doubt that the right of contribution was available *after* the person seeking contribution had been sued under section 106 or 107,[14] these

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12 The *Chem-Dyne* decision, expressly referring to contribution in its discussion, concluded that Congress intentionally omitted the term "joint and several liability" so as "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." 572 F. Supp. at 807 n.3 and 808. "The deletion was not intended as a rejection of joint and several liability. Rather, the term was omitted in order to have the scope of liability determined under common law principles . . . ." *Id.*

13 *See* H.R. Rep. No. 99-253, pt. I, at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("As with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law. Although the only defenses to liability remain those set forth in section 107(b), courts are to resolve such claims on a case-by-case basis, taking into account relevant equitable considerations.").

14 S. Rep. No. 99-11, at 44 (1985) ("This amendment clarifies and confirms the right of a person *held jointly and severally liable* under CERCLA to seek contribution from other potentially liable parties . . .") (emphasis added); H.R. Rep. No. 99-253, pt. I, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 ("The section also confirms a Federal

statements are contradicted by others and, as noted, pertain to much different versions of § 113(f) that were not ultimately adopted. *See Aviall Servs., Inc.*, 263 F.3d at 151 (Wiener, J., dissenting).

The mixed and shifting signals from legislative history yield no guide that should color the textual interpretation of § 113(f)(1). Yet, it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts' development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution. In no event does the history "overwhelmingly support" the panel majority's narrow view of the statute. *Id.* at 140.

For sixteen years, Sections 113(f) and 107 have governed the availability of contribution actions under

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right of contribution or indemnification for persons *alleged or held to be liable* under section 106 or 107 of CERCLA . . . . This section clarifies and confirms the right of a *person held jointly and seve[]rally liable* under CERCLA to seek contribution from other potentially liable parties . . . .") (emphasis added); H.R. Rep. No. 99-253, pt. III, at 18 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3041, *quoted in* n.10, *supra*; H.R. Rep. No. 99-253, pt. V, at 24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3147 ("New subsection (g) expressly recognizes the right to contribution. Any defendant alleged or held to be liable in an action under section 106 or 107 may bring an action for contribution or indemnity against any other person liable or potentially liable."). *But cf.* H.R. Rep. No. 99-253, pt. I, at 59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841 ("The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site."); *id.* at 266, *reprinted in* 1986 U.S.C.C.A.N. at 2940 (separate and dissenting views of Members of Congress) ("The section would also establish a federal right of contribution or indemnity for persons *liable* under section 106 or § 107 of current law . . . .") (emphasis added).

CERCLA. As the Supreme Court explained it, CERCLA, as amended by SARA, authorizes two kinds of contribution actions among PRPs, one that is explicit under § 113(f) and another that is an "implied," "similar and somewhat overlapping" action pursuant to § 107. *Key Tronic Corp.*, 511 U.S. at 816, 114 S. Ct. at 1965-66.[15] To the statute we turn.

II. STATUTORY TEXT

This court's expansive reading of § 113(f)(1) — which enables a claim by a PRP "at whatever time in the cleanup process the party, seeking contribution, decides to pursue it"[16] — suits its text better than the restrictive reading adopted by the dissent.

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15 The parties dispute whether Aviall's pleadings seek contribution under the § 107 implied action as well as under § 113(f)(1). It is unnecessary to reach this question or to opine more concretely on the theoretical problems surrounding this "overlap" of remedies. *See OHM Remediation Servs.*, 116 F.3d at 1571 (SARA amendments "codified the federal common law rights of contribution"); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) ("Congress, in enacting SARA, sought to codify the case law" holding that § 107 conferred implied right of action among PRPs for contribution); *but see In re Reading Co.*, 115 F.3d 1111, 1117-21 (3d Cir. 1997) (holding that § 113(f) is the exclusive statutory vehicle for contribution claims and specifically rejecting "dictum" in *Key Tronic* about "overlapping" contribution actions, 511 U.S. at 816, 114 S. Ct. at 1966).

16 *See In re Reading Co.*, 115 F.3d at 1120: "Indeed, the fact that § 113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under . . . section [107]' reenforces our conclusion that Congress intended § 113 to be the sole means for seeking contribution – at whatever time in the cleanup process the party, seeking contribution, decides to pursue it." We subscribe to the portion of the court's statement quoted above in the text, but have doubts about its exclusivity contention. *See* n.13, *supra*.

The first point of disagreement between the dissent and the en banc majority is over the exclusivity of the claim for contribution described in the first sentence of § 113(f)(1). Does its allowance of contribution actions "during or following" a § 106 or § 107(a) civil action mean that contribution actions are "only" allowed in such circumstances? We think not. The dissent's interpretation of the first sentence of § 113(f) departs from "plain meaning" in several ways. "Only," for instance, is the word choice of the dissent, not of Congress, which characterized the actions permissively (a PRP "may" bring an action for contribution). Elsewhere in CERCLA, Congress used "only" many times, signifying its intent to narrow, exclude or define provisions.[17] Had Congress similarly intended to make contribution actions available "only" after the referenced CERCLA lawsuits have been brought, it could have done so.

After adding "only" to the first sentence of § 113(f)(1), the panel revised "may" to mean "shall," and thus rendered contribution claims available exclusively during or following certain CERCLA civil actions. The dissent then

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17 *See, e.g.*, 42 U.S.C. § 9607(a) (2000) ("Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . ."); 42 U.S.C. § 9613(a) (2000) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia."); 42 U.S.C. § 9613(j)(3) (2000) ("If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national Contingency Plan, . . ."); 42 U.S.C. § 9624(b) (2000) ("In the case of any release or threatened release referred to in paragraph (1), the owner or operator of the equipment described in subsection (a) of this section shall be liable under this chapter only for costs or damages primarily caused by the activities of such owner or operator."). (Emphasis added).

implicitly defines "civil action" to include a federal administrative enforcement proceeding but only when the administrative order is contested or enforced in federal court. No one doubts the importance of permitting contribution claims when administrative enforcement actions are underway. Other courts have authorized such claims.[18] But the dissent has effectively limited the availability of such actions by requiring prior initiation of a lawsuit by the federal government. This interpretation would be unnecessary if the dissent had accorded the properly broad scope to the last sentence of § 113(f)(1) and considered the first sentence, as we do, to be a statement of non-exclusive circumstances in which actions for contribution may be brought.[19]

The final point of contention concerns the inter-relationship of the first and last sentences of § 113(f)(1). Despite the unusual syntax of this subsection, the en banc court finds these sentences logically complementary, if somewhat unusual in this regard. Thus, in addition to affording a particular right of contribution in the first sentence, the provision emphasizes in its last sentence that "nothing" shall "diminish" any other contribution right available to the parties. This so-called "savings provision" takes on added meaning in light of the pre-SARA caselaw, which did not restrict common law contribution actions until during or after proceedings or civil actions against the party

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18 *See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) (allowing CERCLA action for contribution to proceed after issuance of federal administrative order but prior to initiation of suit by any party under section 106 or 107); *Sun Co.*, 124 F.3d at 1189 (same).

19 The dissent now concedes, contrary to the panel majority, that a § 113(f)(1) contribution action may be brought before a judgment is entered, but given their restrictive reading of the provision, that is not much of a concession.

who had incurred disproportionate remediation and response costs.

The dissent, however, is driven to a narrow view of the "savings provision" for fear that any different reading would vitiate the effect of the first sentence of § 113(f)(1).[20] The dissent reads the "savings provision" to refer to actions for contribution under *state* law, implicitly rejecting among other things a construction that would preserve contribution actions arising by federal common law under § 107. Taken together with its exclusive view of the first sentence of § 113(f)(1), the panel's interpretation is at least in tension with the Supreme Court's description of CERCLA contribution:

> Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Key Tronic Corp., 511 U.S. at 816, 114 S. Ct. at 1965-66. It is not clear that the dissent's holding permits an implied § 107 contribution right to coexist.

This is not a situation in which the text of the savings clause robs the first sentence of § 113(f)(1) of its meaning, as the dissent contends. Instead, the provision was enacted as confirmation that federal courts, in cases decided prior to SARA's enactment, had been right to enable PRPs to recover a proportionate share of their costs in actions for contribution against other PRPs. Confirmation of this sort was needed to

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20 *See TRW Inc. v. Andrews*, 534 U.S. 19, __, 122 S. Ct. 441, 449 (2001) (if it can be prevented, no part of a statute, not even a word, should be rendered "superfluous, void, or insignificant") (internal quotation marks omitted); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472, 117 S. Ct. 913, 917 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage").

eliminate the uncertainty in the case law prior to SARA's enactment as to whether contribution was available under CERCLA at all. *See OHM Remediation Servs.*, 116 F.3d at 1581 (Garza, J.); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3d Cir. 1997). The first and last sentences of § 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups.

III. DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AFTER ENACTMENT OF SARA

In numerous published cases decided after the enactment of SARA in 1986, this and other courts of appeals have ruled on CERCLA claims for contribution where no action had been brought under § 106 or § 107 of CERCLA.[21]

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21 In the following cases, no action under § 106 or § 107 — and no federal administrative proceeding — had been brought before suit for contribution was initiated under § 113(f): *Bedford Affiliates*, 156 F.3d 416 (2nd [sic] Cir. 1998) (after negotiations with state agency, Bedford Affiliates agreed in consent order to begin cleanup, in course of which Bedford commenced action for contribution); *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 294 (4th Cir. 2001) (Crofton Ventures notified state agency of contamination, cleaned up facility under agency's "supervision," then sued for contribution under § 113(f)); *Amoco, Inc.*, 889 F.3d at 672-73 (Amoco brought action against Borden "for contribution" after being "informed" by state agency of radioactivity); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001) (companies entered into consent order with state agency [*see* 107 F. Supp. 2d 817, 819-20 (W.D. Mich. 2000)] to fund remedial investigation and feasibility study, then sued other companies for contribution under CERCLA); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998) (after state agency "required" PMC to clean up site, PMC brought suit for contribution under § 113(f)); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 932-33, 935 (8th Cir. 1995) (Control Data reported findings of contamination to state agency, entered into consent decree with agency requiring it to

Hardly any of the decisions have explicitly parsed the language of § 113(f)(1),[22] but that fact weighs more in favor

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investigate, monitor, and clean up contamination, installed remediation system, and then sued Schloff defendants for contribution); *Cadillac Fairview/California, Inc.*, 299 F.3d at 1024 (owner sued other PRPs for damages to cover expenses of investigating soil pollution; no indication in opinion that owner was sued beforehand; prior opinion in case states that testing activities were undertaken at request of state officials, 840 F.2d 691, 692-93 (9th Cir. 1988)); and *Morrison Ents. v. McShares, Inc.*, 2002 WL 1767540 at *1-*2 & *5 n.2 (10th Cir. Aug. 1, 2002) (after state agency ordered Morrison to investigate contamination, Morrison hired consulting firm, then sued McShares for contribution under CERCLA). *See also Fina, Inc. v. ARCO*, 200 F.3d 266 (5th Cir. 2000) (action for contribution and cost recovery under CERCLA). *Cf. New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 99-101, 104 (3d Cir. 1999) (state agency investigated site contamination in 1980s, issued directives to contribution defendants beginning in 1988, and entered into consent orders with them; in 1993, Turnpike Authority filed suit against contribution defendants; summary judgment affirmed for defendants on unrelated grounds, but opinion says Turnpike's "action against other PRPs is properly characterized as a § 113 action").

22 One case that seems to have come close, at the very least, to deciding this question is *Pinal Creek Group*, 118 F.3d 1298, *rev'g* 926 F. Supp. 1400 (D. Ariz. 1996). In that case, the Pinal Group voluntarily expended resources to clean up a waste site, then sued other PRPs for the costs of doing so. *Id.* at 1300; *Pinal Creek Group*, 926 F. Supp. at 1402 (after member of Group provided state agency with proposed action plan, agency "approved" plan; Group was formed, then began response activities "[w]ith the approval and under the oversight" of state agency). The Ninth Circuit rejected Pinal Creek Group's argument that it was entitled to bring a joint and several cost recovery action under § 107. *Id.* at 1303. Instead, the Ninth Circuit concluded that the Group's claim was for contribution, and that § 113 applied to the claim. *Id.* at 1306. The Ninth Circuit did not accept the Group's argument that allowing it a cost recovery action was appropriate because it "ha[d] not incurred any liability which would trigger" a contribution claim under § 113(f). *Id.* at 1305. Pinal Creek Group had contended "that the requisite liability only attaches if the government incurs response costs, arguing that before then, no liability exists under § 107(a), and that the Pinal Group's status as a

of than against our non-restrictive view of the provision. Given the enormous monetary exposure and the volume of litigation surrounding CERCLA mandates, one must assume that talented attorneys have had sufficient incentive and opportunity to explore statutory lacunae such as those created by a cramped reading of § 113(f)(1). Yet all that existed before this case arose are isolated dicta.[23] The absence of direct precedent is like the dog that didn't bark.[24]

PRP, by itself, does not give rise to a claim for contribution." *Id.* The court rejected this argument. Although "PRP status, by itself, does not generate liability," a PRP that incurs "necessary costs of response" for a hazardous waste site consistent with the National Contingency Plan thereby "bec[o]me[s] partly responsible for those costs" along with all other PRPs associated with the site, giving rise to a right of contribution under CERCLA. *Id. Cf. id.* at 1306 ("Under § 107, the Pinal Group's responsibility for its own equitable share of the cleanup costs is generated independently of any liability that might arise from response costs incurred by the government."). In other words, the Group was entitled to bring a claim for contribution simply because it was a PRP that had incurred necessary costs of response consistent with the National Contingency Plan. *See Fireman's Fund Ins. Co.*, 2002 WL 1792612 at *12 (CERCLA "explicitly authorizes any PRP that has incurred response costs to seek contribution from any other PRP.").

23 *See OHM Remediation Servs.*, 116 F.3d at 1580 ("A § 113(f) contribution action is derivative of an action under § 107(a), if only a pending one."); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997) (stating that CERCLA "appears" to require that an action under § 106 or § 107(a) be "ongoing or already completed" before § 113(f)(1) is available," but noting that such a reading of the statute "seems to provide a disincentive for parties voluntarily to undertake cleanup operations"). *But cf. Geraghty & Miller, Inc.*, 234 F.3d at 924 (describing case involving claim for contribution under § 9613(f) as "a case that is neither a recovery claim under section 107 nor derivative of or responsive to any other formalized dispute").

24 Arthur Conan Doyle, *The Silver Blaze*, *in* Memoirs of Sherlock Holmes _____ ( ).

Moreover, the reasoning employed by the court in *Sun Co.*, 124 F.3d 1187 (10th Cir. 1997), favors our reading. In *Sun Co.*, the court held that § 113(f) governs actions for contribution brought by a PRP who had not incurred costs pursuant to a civil action under § 106 or § 107 but was itself subject to an administrative order under § 106. 124 F.3d at 1191. While deciding which CERCLA statute of limitations to apply to such claims, the court said that "PRPs who, like Plaintiffs here, incur cleanup costs pursuant to a unilateral administrative order (or by a consent decree, *or in some cases, voluntarily*) potentially have an unlimited time in which to bring their contribution claims." *Id.* (emphasis added). *See also id.* at 1192 ("PRPs who have incurred costs in some other way [than being sued under § 106 or § 107] are also covered by the language of § 113(f).").[25]

By creating doubt as to the meaning of § 113(f)(1), the dissent has thrown into uncertainty more than two decades of CERCLA practice, if the pre-CERCLA common law of contribution is included. Such a result may not be inconceivable, but it should place a heavy burden on the dissent to explain how its interpretation is justified under a "plain meaning" reading of the statute.

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25 The court went on to explain how reading CERCLA in this way does not, in its view, wreak havoc with the framework set up in § 113(g) governing the limitations periods within which various CERCLA claims may be brought. *Sun Co.*, 124 F.3d at 1191-93. Compare *Geraghty & Miller, Inc.*, 234 F.3d at 924 (adopting *Sun Co.*'s reasoning as to "the appropriate statute of limitations to apply in a [CERCLA] case that is neither a recovery claim under § 107 nor derivative of or responsive to any other formalized dispute").

IV. POLICY CONSIDERATIONS

The dissent's reading of § 113(f)(1) would also create substantial obstacles to achieving the purposes of CERCLA — not only by slowing the reallocation of cleanup costs from less culpable PRPs to more culpable PRPs[26] and by discouraging the voluntary expenditure of PRP funds on cleanup activities,[27] but by diminishing the incentives for PRPs voluntarily to report contamination to state agencies. According to the dissent, even if the TNRCC had unambiguously ordered Aviall to engage in cleanup activities, this would not have triggered Aviall's right to contribution under CERCLA for the costs of such activities. We do not think these effects are required by a faithful reading of the statute.

The dissent hypothesizes that the negative effects of its holding would be mitigated because its reading of the last sentence of § 113(f)(1) allows a PRP to bring an action for contribution under state law. This is surely an inferior and questionable remedy for Congress to have embraced. Not all states allow contribution before the party seeking

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26 This court has acknowledged that allowing parties who have been sued under CERCLA to bring contribution claims "makes possible the joinder of all potentially responsible parties in a single case, an early identification of potentially responsible parties for purposes of settlement, and . . . a single judicial apportionment of cleanup costs among responsible parties." *OHM Remediation Servs.*, 116 F.3d at 1583. The same purposes are achieved by allowing a PRP who has incurred cleanup costs to bring a contribution suit before he himself has been sued.

27 "Without the ability to require contribution from other responsible parties, the current operator may prefer to wait and let the government perform the work." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1465 (9th Cir. 1986) (Reinhardt, J., dissenting).

contribution has been subjected to judgment.[28] And those that do follow quite different substantive and procedural rules.[29] Moreover, as the dissent acknowledges, some courts

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28 The states vary greatly as to whether and to what extent they allow actions for contribution. As of 2000, six of the states, including Texas, had "contribution statutes limited to contribution between judgment debtors." *Restatement (Third) of Torts: Apportionment of Liability* § 23 cmt. a reporters' note, at 292 (2000). Texas law does provide, however, that "[a] person who conducts a removal or remedial action that is approved by the commission [that is, by the TNRCC, *see* Tex. Health & Safety Code Ann. § 361.003(5) (2001)] and is necessary to address a release or threatened release may bring suit in a district court to recover the reasonable and necessary costs of that action and other costs as the court, in its discretion, considers reasonable." Tex. Health & Safety Code Ann. § 361.344(a) (2001). "This right is in addition to the right to file an action for contribution, indemnity, or both in an appeal proceeding or in an action brought by the attorney general." *Id.* Louisiana law also provides for cost recovery for hazardous substance remedial actions, but its scheme is quite different from Texas's. *See, e.g.*, La. Rev. Stat. Ann. § 30:2276(G)(1) (West 2000) (providing, *inter alia*, that "those participating parties who, after an initial demand [for remedial action] is made by the secretary under R.S. 30:2275, agree to clean up the pollution source or facility may, without the institution of a suit by the secretary under R.S. 30:2275, sue and recover from any other nonparticipating party who shall be liable for twice their portion of the remedial costs"). The Mississippi statutes governing disposal of solid wastes, Miss. Code Ann. § 17-17-1 *et seq.*, do not appear to contain a provision for private cost recovery. *See* 57 Am. Jur. Trials 1 § 40 (2002). *Cf.* Miss. Code Ann. § 17-17-29(4) (1995 & Supp. 2002) ("Any person creating, or responsible for creating, through misadventure, happenstance, or otherwise, an immediate necessity for remedial or clean-up action involving solid waste shall be liable for the cost of such remedial or clean-up action and the commission may recover the cost of same by a civil action brought in the circuit court of the county in which venue may lie.").

29 *See Restatement (Third) of Torts: Apportionment of Liability* § 23 cmt. a reporters' note, at 291-92 (2000) (describing six categories of state contribution statutes and identifying two states that "recognize contribution without a statute"). *Cf.* 42 U.S.C. § 9613(f)(1) (2000)

of appeals have held that CERCLA preempts state-law claims for contribution for environmental cleanup costs.[30]

Policy considerations cannot change the interpretation of Congress's language, but they can contribute to an understanding of the language. This court's understanding, like that of most courts preceding and following enactment of § 113(f)(1), better fulfills the statutory purposes.

V. CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the case for proceedings consistent with this opinion. This leaves to the district court, for determination in the first instance, two issues previously left unaddressed. 263 F.3d at 137 n.3. The first issue is whether Aviall failed to give timely notice to the EPA and the Attorney General of its action under CERCLA. The second is whether Aviall complied with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, by failing to provide adequate opportunity for public participation. *See OHM Remediation Servs.*, 116 F.3d at 1583 (remanding for similar determinations).

REVERSED and **REMANDED**.

(providing that CERCLA contribution "claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law").

30 *See Bedford Affiliates*, 156 F.3d at 425-27; *PMC, Inc.*, 151 F.3d at 617-18; *In re Reading Co.*, 115 F.3d at 1117. We express no view on the preemption question.

EMILIO M. GARZA, Circuit Judge, with whom SMITH and BARKSDALE, Circuit Judges, join, dissenting:

The majority opinion holds that a party may bring an action for contribution under § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1),[31] without being subject to a prior or pending § 106 or § 107 action. Because the majority's holding cannot be reconciled with the text or structure of the statute, I dissent.

The majority acknowledges the tenuous nature of its textual analysis by characterizing § 113(f)(1) as a provision whose "syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous." The text is not so opaque as the majority opinion asserts.

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31 Section 113(f)(1) provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

The first sentence of § 113(f)(1) provides: "[a]ny person *may* seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)]." 42 U.S.C. § 9613(f)(1) (emphasis added). The majority opinion reasons that the word "may" implies that contribution suits are permitted during the pendency of a § 106 or § 107 cost recovery action, but that a § 106 or § 107 action is not a prerequisite to a contribution suit. This analysis is problematic. The inclusion of the word "may" in an enabling provision generally establishes an exclusive cause of action. *See Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1361 (5th Cir. 1994) (holding that the word "may," when included as part of an enabling provision, implies an exclusive cause of action); *see also* WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) (defining "may" as "shall" or "must" "esp[ecially] in deeds, contracts, and statutes"). Thus, the word "may" in the first sentence of § 113(f)(1), the enabling provision, establishes that contribution suits must be brought "during or following" a civil action under § 106 or § 107.

The phrase "during or following" also indicates that § 113(f)(1) is available only after a primary cost recovery action commences. This phrase serves two purposes. First, it reflects the general legal proposition that contribution actions do not require the *execution* of a final judgment before they can be brought. *See* RESTATEMENT (SECOND) OF TORTS § 886A(1) (1977) ("[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered* against all or any of them." (emphasis added)). Second, the phrase "during or following" imposes a limitation on the timing of CERCLA contribution suits. Section 113(f)(1) requires, as its language suggests,

that an initial cost recovery action commence before a contribution claim can proceed.[32]

Despite the limiting language in § 113(f)(1)'s enabling clause, the majority opinion concludes that the provision authorizes a party to sue for contribution in *any* circumstance. To justify this conclusion, the majority opinion focuses on the last sentence of § 113(f)(1) — the savings clause.[33] However, this clause does not authorize contribution actions under any and all circumstances. Section 113(f)(1)'s savings clause, like CERCLA's general savings clause, is best interpreted as expressly preserving *state law* causes of action.[34] When Congress meant to preserve *both* federal and state law causes of action, it said so

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32 As reflected in its amicus brief to this Court, the Department of Justice, the federal government entity charged with the enforcement of CERCLA, adopts this interpretation.

33 The savings clause provides: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]." 42 U.S.C. § 9613(f)(1).

34 Congress's inclusion of the phrase "civil action" provides support for this interpretation. "Civil action," as defined in the Federal Rules of Civil Procedure, has a specific meaning. FED. R. CIV. P. 2 provides: "[t]here shall be one form of action to be known as a 'civil action.'" When § 113(f)(1) uses the term "civil action," it is referring to an action brought in federal court. (Thus, § 113(f) permits contribution actions following an administrative remedial order only when the government files suit in federal court under § 106 to enforce the order.) This connection is further reinforced by § 113(f)(1)'s additional reference in the following sentence, which provides: "Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law." 42 U.S.C. § 9613(f)(1). The savings clause, in contrast, references only an "*action* for contribution," which, by the absence of the word "civil," contemplates a proceeding in a non-federal forum, such as state court.

explicitly. *See* 42 U.S.C. § 9652(d) (CERCLA's general savings clause provides: "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants"); *see also PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617 (7th Cir. 1998) ("The purpose of CERCLA's [general] savings clause is to preserve to victims of toxic wastes the other remedies they may have under *federal or state law*.") (emphasis added).[35]

The practical effect of the majority opinion's holding is that § 113(f)(1)'s savings clause overrides its enabling clause. In other words, the enabling clause does nothing more than provide an example of when a contribution action *might* be brought.[36] This conflicts with elementary canons of statutory construction. An enacting sentence containing limiting language cannot be trumped by a savings clause purporting to save all other possible causes of action. Rather,

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35 Other circuit court decisions have held that the federal contribution right codified in § 113(f) preempts all state law contribution claims. *See, e.g., PMC, Inc.*, 151 F.3d at 617-18 (holding § 113 preempts state law contribution actions); *Bedford Affiliates v. Sills*, 156 F.3d 416, 425-27 (2d Cir. 1998) (finding that § 113 preempts state law restitution and indemnification actions); *In re Reading Co.*, 115 F.3d 1111, 1117, 1119-20 (3d Cir. 1997) (holding CERCLA preempts any state law contribution claims). These decisions do not conflict with the interpretation advanced in this dissent. Following the reasoning of these courts, if a party does not seek to utilize the federal contribution provisions, it is still free to proceed under state law.

36 It is difficult to imagine that the drafters of § 113 deliberately included ambiguous language in the enabling clause, and then sought to clarify its meaning though the savings clause. *Cf. Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420-21 (7th Cir. 1993) (declining to interpret savings clause in FIRREA in a manner that would "swallow up the specific language" of the provision).

any "repugnancy between the savings clause and the purview does not make the enacting part void but operates to invalidate the savings clause." 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.12 (6th ed. 2000). The majority opinion's interpretation of the savings clause, however, renders the enabling clause inoperative. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (citing the "elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative").

It is also important to note that § 113(f)(1) does not create categories of liability, but rather relies on § 107(a)'s definition of liability and simply apportions costs among the liable parties. *See, e.g., Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (stating that § 113 "is no more than a mechanism for apportioning CERCLA-defined costs," and also noting that § 113 incorporates the liabilities set forth in § 107) (internal citations and quotations omitted). Prior to the passage of SARA, courts implied a contribution right from the language of § 107(a)(4)(B).[37] The

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37 CERCLA, as originally enacted, did not include an express contribution provision. Instead, courts implied a contribution right from language in § 107(a)(4)(B). *See, e.g., Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("Allowing a private action to recover response costs from responsible parties under [§ 107(a)(4)(B)] is thus consistent with both the language of [§ 107(a)(4)(B)] and with the congressional purpose underlying CERCLA as a whole."). In 1986, Congress, in an effort to expedite the clean-up of hazardous waste sites, passed the Superfund Amendments and Reauthorization Act ("SARA"). As part of SARA, Congress codified the right to contribution under CERCLA in the provisions set forth in § 113. *See* H.R. REP. NO. 99-253(I), at *78-79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 ("It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA. . . . [§ 113(f)] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.").

overall structure of CERCLA's liability provisions demonstrates that § 113 is merely a subset of § 107, providing only for the *allocation* of CERCLA-defined liability. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) ("Section 107 sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert").[38] Therefore, a § 113(f)(1) action should be contingent upon the commencement of a prior or pending cost recovery action under § 106 or § 107.

The structure of § 113 supports this interpretation. Section 113(g)(3), which sets out the applicable statute of limitations for contribution actions proceeding under § 113, suggests that a § 113(f)(1) action cannot proceed in the absence of an initial cost recovery action. This provision sets forth a three-year limitations period, which would begin to run following the date of judgment in a § 106 or § 107 action.[39] Significantly, the statute is silent as to the

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38 The majority opinion quotes language from *Key Tronic*, in which the Supreme Court observed that CERLCA, as amended by SARA, "now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Key Tronic*, 511 U.S. at 816. The Court did indeed acknowledge that both clauses provide parties with a way to recover clean-up costs. The Court did not find, however, that both clauses provide a way of allocating liability.

39 Section 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> > (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

limitations period to be applied in the absence of a § 106 or § 107 civil action. Pursuant to the majority opinion's interpretation of § 113(f)(1), courts would be required to derive from some other source the limitations period to apply in this instance. Some courts have attempted to do just that, adopting the limitations period for initial cost recovery actions under § 113(g)(2)[40] and applying it to contribution actions proceeding in the absence of a § 106 or § 107 action.

> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3).

40 Section 113(g)(2) provides:

> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—
>
> > (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
> >
> > (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2).

See, e.g., Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 924-25 (5th Cir. 2000) (finding that if there is no prior § 107 action, a § 113(f)(1) contribution must be brought within six years); *Sun Co.*, 124 F.3d at 1191-92 (same); *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994) (stating that a contribution action brought in the absence of an underlying § 106 or § 107 action must be brought within three years of the accrual of the right to contribution because contribution and initial cost-recovery actions are distinct remedies). Such herculean efforts are unnecessary. Section 113(g)(3)(A) provides that no action for contribution may be commenced more than three years after "the date of judgment in any action under this chapter for recovery of such costs or damages." 42 U.S.C. § 9613(g)(3)(A). There is no need to look outside of the contribution provisions in § 113(g)(3) to determine the appropriate limitations period.[41]

In sum, the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the

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41 In addition, § 113(f)(2) provides that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). Section 113(f)(3)(B), in turn, states that "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in [§ 113(f)(2)]." 42 U.S.C. § 9613(f)(3)(B). Taken together, these two sections create a powerful mechanism to encourage settlements by Potentially Responsible Parties ("PRPs") by protecting parties who settle from being sued in later contribution actions and granting a contribution right to those PRPs who enter into approved settlements. Allowing a contribution action to proceed in the absence of a pending § 106 or § 107(a) action would undermine these incentives.

contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action.[42]

The majority opinion asserts that its interpretation of § 113(f)(1) is supported by existing precedent. However, the question presented here is one of first impression in the courts of appeals.[43] The handful of district courts attempting

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42 As the majority opinion concedes, the legislative history of § 113(f)(1) does not contradict this statutory analysis. CERCLA did not include an explicit contribution provision until the passage of SARA in 1986. SARA's legislative history suggests that Congress intended to create only a limited federal contribution right when it enacted § 113(f)(1). For example, when explaining § 113(f) to the House of Representatives, the provision was described as "confirm[ing] a Federal right of contribution or indemnification for persons *alleged or held to be liable* under section 106 or 107 of CERCLA and prohibit[ing] the assertion of such rights against a party who has entered into a judicially approved settlement with the EPA." H.R. REP. NO. 99-253(I), at *79, *reprinted in* 1986 U.S.C.C.A.N 2835, 2861 (emphasis added). As evidenced by this statement, Congress intended there to be a prior or pending § 106 or § 107 action before a party could seek contribution from other PRPs. Further, when the Judiciary Committee amended a previous version of § 113(f)(1) to provide for contribution actions "during or following" a § 106 or § 107 action, the change was explained as "clarif[ying] and emphasiz[ing] that persons who settle with the EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. REP. NO. 99-253(III), at *18, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041. The legislative history of § 113(f)(1) never states that a contribution action can be brought in the absence of a prior or pending cost recovery action. Had Congress intended to create such a broad contribution right, it would have done so explicitly.

43 While this and other appellate courts have addressed related questions concerning the proper interpretation of § 113(f)(1), none of them have specifically addressed the issue with which we are confronted: whether a § 106 or § 107 action is a statutory prerequisite to a § 113(f)(1) contribution action. *See OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1582 n.2 (5th Cir. 1997) (permitting contribution claim against third-party defendant, but specifically stating

a statutory analysis of § 113(f)(1) have reached differing conclusions.[44] Thus, the case law provides no clear guidance on the interpretation of § 113(f)(1).

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that the court "express[es] no opinion as to whether a party may be considered a PRP before being sued under CERCLA"); *Geraghty & Miller*, 234 F.3d at 925 (analyzing the statute of limitations provisions set forth in § 113(g)(2), and holding that a contribution action must be commenced within three years of the completion of removal action); *Crofton Ventures Ltd. P'ship v. G&H P'ship*, 258 F.3d 292, 297 (4th Cir. 2001) (permitting § 113 action to proceed after state-ordered cleanup, but failing to specifically address the language of § 113(f)(1)); *Bedford Affiliates*, 156 F.3d at 424 (permitting § 113 action after state-ordered cleanup, but never addressing what requirements are imposed by § 113's specific language); *PMC, Inc.*, 151 F.3d at 618 (holding § 113 preempts recovery under state contribution law); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (holding PRP is limited to recovery from other PRPs under § 113, and cannot utilize § 107); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) (noting in dicta that "a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available"). Because none of these circuit court decisions specifically confront the issue before us, we reject Aviall's contention that our interpretation conflicts with existing precedent. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (holding that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

44 Several district courts have held that contribution under § 113(f)(1) is conditioned on the existence of a prior § 106 or § 107 cost recovery action. *See Estes v. Scotsman Group Inc.*, 16 F. Supp. 2d. 983 (C.D. Ill. 1998); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) (stating that "[d]efendants are correct that contribution is a remedy available to parties held liable, through judgment or settlement, in some damages actions. To receive any actual compensation through an action for contribution, the party must have been found liable as a defendant in an earlier or pending action."). For instance, in *Estes*, a case whose facts are strikingly similar to those here, a PRP undertook a cleanup of its contaminated property after receiving a letter from the state environmental agency. *Estes*, 16 F. Supp. 2d at 989-90. Following the

The majority opinion supports its analysis by focusing on policy concerns. In particular, the majority opinion asserts that requiring the commencement of a § 106 or § 107 civil action before a § 113 contribution action can be brought undermines CERCLA's goal of promoting prompt and effective clean-ups. The majority opinion's policy justifications ultimately amount to an assertion that there are more effective means of promoting private clean-ups than by conditioning the availability of § 113(f)(1) on a prior federal action or judicially approved settlement. However, when a statute's language and structure are clear, as in this case, it is unnecessary to consider such policy arguments. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). It is not our role to substitute our judgment for that of Congress when weighing the effectiveness of statutory provisions. Instead,

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clean-up, the PRP filed a CERCLA claim against the prior owner under § 107(a) and § 113(f)(1). The district court dismissed the PRP's § 107(a) cost recovery action and then relied on the plain meaning of the statute to hold that the plaintiff could not seek contribution under § 113(f)(1) because the action was not "during or following" a cost recovery suit. *Id.* at 989 (stating that the "[s]ection 113(f) [claim] should be dismissed because there is no § 106 or § 107 claim pending").

In contrast, other district courts have adopted the majority opinion's interpretation and held that a contribution action can proceed in the absence of a prior or pending cost recovery action. *See, e.g., Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 208 (D. Conn. 2001) (allowing the plaintiff to assert a contribution claim under § 113(f)(1) in the absence of a pending or adjudged § 107 civil action); *Ninth Ave. Remedial Corp. v. Allis Chalmers Corp.*, 974 F. Supp. 684, 691 (N.D. Ind. 1997) (finding that a "PRP can bring a section 113 action even when no prior or pending section 106 or 107 civil actions have occurred").

we must adhere to the contribution scheme created by Congress.[45]

The text of § 113(f)(1) allows a contribution action only for those parties who are subject to a prior or pending § 106 or § 107 cost recovery action. I, therefore, respectfully dissent.

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45 The majority opinion suggests that the interpretation advanced in this dissent violates the axiom that laws should be construed to avoid an absurd or unreasonable result. The plain meaning of the statute, which requires that a § 106 or § 107 action precede a contribution action under § 113(f)(1), does *not* lead to an absurd result. Contribution is readily available under the statute. The statute sets out three ways in which a party can achieve the right to seek contribution. First, an innocent party may bring a § 107 action against a PRP. Any party named in the § 107 action may subsequently bring a § 113 claim following the commencement of the initial § 107 action. Second, the government may bring an abatement action in federal court pursuant to § 106(b). At any point following the filing of the § 106 action in federal court, a named party can seek contribution from another PRP under § 113(f)(1). Finally, a PRP who has resolved its liability to the United States or a state in an administratively or judicially approved settlement can seek contribution pursuant to § 113(f)(3)(B). *See* H.R. REP. NO. 99-253(I), at *80, *reprinted in* U.S.C.C.A.N. 2385, 2862 ("Parties who settle for all or part of a cleanup or its costs, or who pay judgments as a result of litigation, can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement."). Taken together, these three methods by which to obtain access to § 113(f)(1) effectively preserve and encourage CERCLA's important goals.

Nothing in § 113(f)(1) prevents a PRP from seeking contribution under state law. Section 113(f)(1)'s savings clause specifically preserves other contribution remedies. Aviall itself has taken advantage of state contribution law in its attempt to seek recovery of clean-up costs from Cooper. These alternate contribution remedies may ultimately expedite clean-up of contaminated sites by reducing the burden on the federal government to investigate and oversee all remediation efforts.

AVIALL SERVICES INC, Plaintiff-Counter Defendant-Appellant versus COOPER INDUSTRIES INC, Defendant-Counter Claimant-Appellee

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No. 00-10197

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

December 19, 2001, Decided

Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges.

ON PETITION FOR REHEARING AND REHEARING EN BANC

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-10197

AVIALL SERVICES, INC.,

Plaintiff-Counterdefendant-Appellant,

versus

COOPER INDUSTRIES, INC.,

Defendant-Counterclaimant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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August 14, 2001

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Aviall Services, Inc. ("Aviall") appeals the summary judgment dismissal of its contribution claim based on the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1). The district court ruled that Aviall could not seek contribution from Cooper Industries, Inc. ("Cooper") unless Aviall had incurred or at least faced liability under a CERCLA

administrative abatement or cost recovery action. We affirm, holding that the text of CERCLA requires this result.

I

Cooper ran an aircraft engine maintenance business at several of its industrial facilities. The rebuilding of aircraft engines required the use of petroleum and other hazardous substances, some of which seeped into the ground and groundwater through underground storage tanks and spills. Among the industrial facilities contaminated were Love Field, Carter Field and Forest Park (collectively, the "Facilities"). In 1981, Cooper sold its aircraft engine maintenance business, along with the Facilities, to Aviall. Several years later, Aviall began discovering some of the contamination that had occurred at the Facilities. Aviall admits, though, that the pollution of the Facilities continued under its stewardship as well.

Aviall notified the Texas Natural Resource Conservation Commission ("TNRCC") of the contamination at its Facilities. In turn, the TNRCC sent several letters to Aviall informing the company that it was in violation of Texas state environmental laws. Notably, the Environmental Protection Agency ("EPA") never contacted Aviall or designated the Facilities as contaminated sites. In 1984, Aviall began a decade-long environmental cleanup, spending millions of dollars. In early 1995, Aviall for the first time contacted Cooper seeking reimbursement. Aviall eventually sold the Facilities to another private party, but it contractually retained a continuing responsibility for the environmental cleanup.

In 1997, Aviall filed this lawsuit against Cooper based in part on CERCLA's § 107(a) "cost recovery" provision, which allows innocent persons to recover

environmental response costs from liable parties. Aviall later amended its complaint dropping the § 107(a) cost recovery claim, while adding contribution claims under § 113(f)(1) of CERCLA as well as under the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. § 361.344(a) (West 1992 & Supp. 2001), and the Texas Water Code, TEX. WATER CODE ANN. § 26.3513(j) (West 2000). The district court granted Cooper's motion for summary judgment, dismissing the § 113(f)(1) CERCLA contribution claim and then declining to exercise supplemental jurisdiction over the state law contribution claims. Relying on the plain language of the statute, the court held that Aviall could not assert a § 113(f)(1) contribution claim unless it was subject to a prior or pending CERCLA action involving either § 106 (federal administrative abatement action) or § 107(a) (cost recovery action by the government or a private party).[1]

On appeal, Aviall admits that neither the EPA nor any private party has filed a CERCLA claim against it. Notwithstanding this lack of federal action against it, Aviall claims that it can pursue CERCLA-based contribution because it voluntarily cleaned up the contamination, or at least it did so at the behest of a *state* environmental agency. Before discussing the merits of these arguments, we briefly review the structure and history of CERCLA.

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1 The pertinent parts of the contribution provision read: "Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)]. . . . Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107(a)]." 42 U.S.C. § 9613(f) (emphasis added).

II

Congress enacted CERCLA to facilitate the cleanup of hazardous waste sites, and to shift the costs of environmental response from the taxpayers to the parties who benefitted from the use or disposal of the hazardous substances. *See OHM Remediation Serv. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997). The statute allows parties who incur environmental cleanup costs to recover from persons commonly referred to as "potentially responsible parties" ("PRPs"). *See* 42 U.S.C. § 9607(a). Subject to certain statutory exceptions, PRPs are broadly defined to include: (1) current owners and operators of vessels or facilities that accepted hazardous substances; (2) past owners or operators of facilities where hazardous substances were disposed; (3) persons who by contract or agreement arranged for the disposal or transport of hazardous substances; and (4) persons who accept or accepted hazardous substances for transport to disposal or treatment facilities. *See* 42 U.S.C. § 9607(a).

CERCLA provides two ways for parties to recover environmental response costs. The § 107(a) cost recovery provision permits the government or an "innocent" private party to recoup cleanup costs from PRPs. *See* 42 U.S.C. § 9607(a)(4) (stating that PRPs "shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State . . . [and] (B) any other necessary costs of response incurred by any other person. . ."). PRPs are held jointly and severally liable under this cost recovery provision. The other method of recovering environmental response costs involves § 113(f)(1), the contribution provision. *See* 42 U.S.C. § 9613(f)(1). It allows a PRP to seek contribution from other PRPs if it assumed a disproportionate share of the cleanup costs. Under § 113(f)(1), courts have the discretion to allocate the response costs equitably among the various PRPs. CERCLA

additionally includes a provision (§ 106) for the federal government to seek an administrative abatement order (enforceable in court) against PRPs. *See* 42 U.S.C. § 9606.

Courts have elaborated on the distinction between a contribution action under § 113(f)(1) and a cost recovery action under § 107(a). A contribution claim involves actions between PRPs, while a cost recovery suit is initiated by a non-responsible party against a PRP. *See, e.g., OHM*, 116 F.3d at 1583. Thus, a PRP cannot file a § 107(a) suit against another PRP; it must pursue a contribution action instead. *See id.* In the present case, Aviall and Cooper concede that they are both PRPs because they both contributed to the contamination of the Facilities.[2] The issue presented in this case is whether a PRP seeking a § 113(f)(1) contribution suit must have an ongoing or adjudged § 106 or § 107(a) action against it.

III

After examining the text and structure of CERCLA, we hold that a party can seek a § 113(f)(1) contribution claim only if there is a prior or pending federal § 106 or § 107(a) action against it.[3] While no directly binding case law exists, we believe that the majority of courts that have addressed this issue agree with our textual analysis. Moreover, the

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2 Aviall accordingly dropped its § 107(a) claim in its amended complaint.

3 Cooper offered two additional, independent arguments why Aviall's contribution claim should be barred: (1) it failed to notify timely the EPA and the Attorney General of its private party CERCLA action; and (2) it did not comply with the National Contingency Plan by failing to provide adequate opportunity for public participation. We need not address these two arguments, given that we bar Aviall's contribution claim because of the lack of a pending or adjudged CERCLA claim.

legislative history, as a secondary source, reinforces our interpretation. We review the district court's grant of summary judgment de novo, construing all facts and inferences in the light most favorable to the nonmoving party. *See Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 241 (5th Cir. 1998).

A

Any analysis of a statutory provision must be tethered and true to the text. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S. Ct. 1599, 1603, 128 L. Ed. 2d. **[sic]** 319 (1994) ("When interpreting a statute, we look first and foremost to its text"). The contribution section of CERCLA states: "Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], *during or following* any civil action under [§ 106] or under [§ 107(a)]." 42 U.S.C. § 9613(f) (emphasis added).

A plain language reading of the statute requires a PRP seeking contribution from other PRPs to have filed a § 113(f)(1) claim "during or following" a federal CERCLA action against it. Aviall concedes that it did not file its § 113(f)(1) contribution claim "during or following" a § 106 or § 107(a) action against it, but it argues that neither action is necessary as long as it voluntarily cleaned up the Facilities. It alternatively contends that it can seek contribution because the TNRCC compelled it to clean up the Facilities—even though CERCLA does not expressly specify that contributions are allowed in the context of state agency enforcement orders.

We begin our analysis with the word "contribution" itself. The word "contribution" is defined as the "[r]ight of one who has discharged a common liability to recover of another also liable . . . . Under principle of 'contribution,' a

tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors . . . ." BLACK'S LAW DICTIONARY 329 (6th ed. 1990). As further explained in Sections C and D, we believe that the commonly accepted definition of contribution requires a tortfeasor to first face judgment before it can seek contribution from other parties.

Notwithstanding the definition of "contribution," Aviall claims that the statutory language of CERCLA supports its view. It first notes that under § 113(f)(1), "[a]ny person *may* seek contribution . . . during or following any civil action under [§ 106] or under [§ 107(a)]." 42 U.S.C. § 9613(f) (emphasis added). The key question is whether the use of the word "may" signifies an exclusive means for contribution (as in a party "may only" or "must" seek contribution during or following a CERCLA action), or a non-exclusive means for contribution (as in a party "may choose one of several ways" to seek contribution, and one way is during or following a CERCLA action). Aviall adopts the latter view, arguing that § 113(f)(1) does not affirmatively exclude contribution suits initiated under other circumstances. If the former view was intended, Aviall claims, Congress would have stated that a party "may only" seek contribution during or following CERCLA actions.

Aviall's analysis is inconsistent with our canons of statutory construction. Depending on the context, the word "may" can have the permissive definition of "have liberty to," or alternatively, it can denote exclusivity as in "shall [or] must." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993). We have held that when the word "may" is used as an enabling provision creating a cause of action (as it is here), it establishes an exclusive cause of action and

means "shall" or "must."[4] Accordingly, a party can file a contribution claim only if it has been alleged or deemed liable under § 107(a) or if the federal government has ordered it to clean up contaminated sites under § 106.

Our reasoning in *Resolution Trust Corp v. Miramon*, 22 F.3d 1357 (5th Cir. 1994), is instructive. In *Miramon*, the Resolution Trust Corporation disputed the district court's interpretation of the Financial Institutions Reform, Recovery and Enforcement Act, which states that a "director or officer . . . *may* be held personally liable for monetary damages in any civil action . . . for gross negligence." *Id.* at 1360-61 (emphasis added). The issue was whether or not the statute adopted an exclusive gross negligence standard. The RTC offered the exact same argument that Aviall maintains today: it argued that "[i]f that section were meant to be exclusive . . . it would have said 'may only.'" *Id.* at 1361. We rejected that argument, holding that the word "may," when used in the context of establishing an enabling provision, creates an exclusive cause of action. *See id.* at 361 n.5 ("Read in context, the word 'may' refers to the right of the [RTC] to bring an action under this section. 'May' cannot reasonably be read to qualify the gross negligence standard"). Similarly in our case, the word "may" in CERCLA is used in the context of empowering a contribution action. Simply put, when a statute creates a cause of action, we must narrowly read the word "may" as establishing an exclusive enabling provision. Otherwise, we would "undermine[] the very cause of action the section creates" because the statute would then essentially open the floodgates for parties to pursue causes of

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4 Thus, we reject Aviall's argument that Congress would have used the words "may only" if it had intended to create an exclusive cause of action. It has long been recognized that the word "may" can mean "shall" or "must . . . esp[ecially] in deeds, contracts, and statutes." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993).

action through unspecified and unnamed methods. *Id.* at 1361. In fact, it would have been pointless for Congress to have expressly limited contribution suits to "during or following" a CERCLA action if a party could ignore that limitation and still seek contribution.

Aviall also relies on the last sentence of § 113(f)(1), the general savings clause: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]." 42 U.S.C. § 9613(f). Aviall states that this clause reinforces its view that Congress intended to allow contribution suits, regardless of whether the parties are CERCLA defendants in a § 106 or § 107(a) action.

We reject Aviall's reading of the savings clause, and instead interpret it to mean that the statute does not affect a party's ability to bring contribution actions based on *state* law. If we adopted Aviall's interpretation, it would render superfluous the first sentence of § 113(f)(1), the enabling clause. As we noted in analyzing that sentence, why would Congress have incorporated an enabling provision (allowing parties to seek contribution "during or following" a § 106 or § 107(a) action) if a party could bring a contribution claim regardless of the enabling clause's "during or following" limitation? It makes little sense that Congress would codify the "during or following" limitation, and then expressly invalidate it within the very same section. Thus, the dissent is left to argue that the "during or following a civil action" language is not actually a limitation on when a party can seek contribution but rather "an express reaffirmation of the right to seek contribution before judgment," and further that the savings clause serves no purpose other than to "make abundantly clear" that point—just in case a reader might place an "overly restrictive reading" on the words "during or following." Put another way, the dissent seemingly argues that Congress deliberately made the meaning of the enabling

provision unclear, and then decided to clarify that ambiguity by adding a savings clause in the same section. We reject such an interpretation of the contribution section.

Additionally, we have held that "[r]eading the savings clause to nullify the substantive portion of the section would 'violate the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Miramon*, 22 F.3d at 1361. Aviall's reading would further violate another canon of construction that the specific governs the general. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992) (interpreting a savings clause). We will not read "CERCLA's savings clause . . . to gut provisions of CERCLA." *PMC, Inc. v. Sherwins-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (analyzing the CERCLA savings clause under 42 U.S.C. § 9652(d)).

A more reasonable reading of the savings clause suggests that Congress wanted to "merely nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute." *Id.* More specifically, the savings clause was likely intended to preserve state law-based claims of contribution. *See id.* ("The purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law"); *see also Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) ("[W]e view the last sentence of [§ 113(f)(1)] . . . as an assurance that contribution remains available in other contexts, such as through Rockwell's claims for contribution under Illinois law"). Indeed, Aviall has done just that: it has filed contribution claims against Cooper under Texas state law, in addition to its § 113(f)(1) suit.

In short, we hold that, as a matter of statutory text and structure, CERCLA requires a party seeking contribution to be, or have been, a defendant in a § 106 or § 107(a) action.[5]

B

The legislative history of CERCLA reinforces our analysis of the statutory text. While legislative history sometimes is of limited value due to its potential ambiguity, it can nevertheless be useful when it overwhelmingly supports one side, as it does in this case. *See Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir. 1988) (stating that "[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously.")

The original CERCLA statute did not explicitly state whether one PRP could sue another PRP for contribution, although several district courts had implied such a right. In 1986, Congress amended CERCLA with the Superfund

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5 The dissenting opinion argues that our reading of the statute is "contorted" because we acknowledge that a federal abatement *order* under § 106 can trigger the right of contribution under § 113(f)(1), which allows contributions "during or following any civil *action* under section 9606 [§ 106] of this title or under section 9607(a) [§ 107(a)] of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). The dissent states that the word "action" usually refers to "lawsuits," and thus cannot include a federal abatement order. The language and structure of the statute suggest that the definition of the word "action" under § 113(f)(1) includes abatement orders. The contribution provision explicitly refers to § 106, which is entitled "Abatement actions." Under this heading of "Abatement actions," the section allows the President to "issu[e] such orders as may be necessary to protect public health and welfare and environment," and provides that the government can enforce these orders in court if a party refuses to comply with them. 42 U.S.C. § 9606(a), (b).

Amendments and Reauthorization Act ("SARA"), codifying an express contribution provision in § 113(f)(1). *See* 42 U.S.C. § 9613(f)(1). While Congress drafted CERCLA as a broad remedial statute, Congress equally made it clear in passing SARA that it intended only a *limited* federal right of contribution.

A House of Representatives conference report on SARA emphasized that a party seeking contribution must have first incurred (or at least must face potential) cleanup costs pursuant to either § 107(a) or § 106. The report stated, "This section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." H.R. REP. No. 00-253(I) (1985), *reprinted in* U.S.C.C.A.N. 2835, 1985 WL 25943 at 26 (Leg.Hist.) (emphasis added). The Senate's SARA report echoed the House's legislative intent. It explained that the new contribution provision permits "parties *found liable under sections 106 or 107* [to] have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid." S. REP. NO. 99-11 at 43 (1985) (emphasis added).

The House report added that a contribution action exists even if a CERCLA action is merely pending: "The section contemplates that if an action under section 106 or 107 of the Act is under way, any related claims for contribution or indemnification may be brought in such an action." H.R. REP. NO. 00-253(I), 1985 WL 25943 at 26. The legislative history never mentions that SARA intended to allow contribution in the absence of either a pending or prior § 106 or § 107(a) action. The House report's emphasis that even a pending CERCLA claim is sufficient to allow contribution suits suggests that a PRP seeking contribution must, at the very least, have a CERCLA suit filed against it. As the House report declared, § 113(f)(1) was added to "confirm[] a Federal right of contribution or indemnification

for persons alleged or held to be liable under section 106 or 107 of CERCLA." *Id.*

C

The majority of the courts addressing § 113(f)(1) have agreed with our textual analysis. No federal circuit has yet directly weighed in on this question, but several district courts have discussed when a party can file a contribution action.

A helpful district court decision is *Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983 (C.D. Ill. 1998), a case factually similar to Aviall's situation. In *Estes*, Nicholas Estes purchased an industrial site contaminated with hazardous substances, which he moved and handled in violation of environmental regulatory guidelines. After the Illinois Environmental Protection Agency sent Estes an enforcement notice letter, he undertook a cleanup of the site. Estes then filed a CERCLA claim based on § 107(a) and § 113(f)(1) against the prior owner. The district court dismissed the § 107(a) cost recovery action because it held that Estes, as a PRP, could not file a cost recovery suit. The court then relied on the plain meaning of the statute to hold that Estes could not seek contribution under § 113(f)(1) unless that action was "during or following" a cost recovery suit or a federal administrative order against Estes. Because Estes was not a defendant in a CERCLA action, the court dismissed his § 113(f)(1) claim. *See id.* at 989 ("Section 113(f) [claim] should be dismissed because there is no § 106 or § 107 claim pending"). It did not matter to the court that Estes had received an enforcement notice letter from the state environmental agency, or that he may have cleaned up the sites voluntarily.

Similarly, another district court dismissed a PRP's contribution claim as "premature and improper" because the PRP was "yet to be found liable" under CERCLA. *See Deby, Inc. v. Cooper Indus.*, No. 99C2464, 2000 WL 263985, *6 (N.D. Ill. Feb. 29, 2000) ("Contribution is a remedy available to parties held liable, through judgment or settlement, in some damages action. . . . To receive actual compensation . . . the party must have been found liable as a defendant in an earlier or pending action.") (internal citations omitted). Several other district courts have reaffirmed this textual analysis of CERCLA's contribution provision. *See United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d. [sic] 339, 350 (D.N.J. 1999) ("If the Settlors, by settling with the United States, meet the requirements of liability under Section 107(a) . . . Settlors may pursue apportionment under Section 113(f)(1) for that part of their expenditures that exceeds its share of liability"); *Southdown v. Allen*, 119 F. Supp. 2d 1223, 1245 n.41 (N.D. Ala. 2000) (citing the district court opinion of *Aviall v. Cooper* for the proposition that "[o]nce the district court determines who are responsible parties under § 107(a), the next step under § 113(f) is to allocate responsibility among the parties.") (citations omitted).[6]

In addition to these district courts, two Circuit courts—including this one—have suggested in dicta that a party cannot file a contribution claim unless it is a defendant

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6 We note that while some district courts agree that a party filing a § 113(f)(1) action requires a prior or pending § 106 or § 107(a) claim against it, they add that a party who does not face such a claim can at least ask for a declaratory judgment in the event that it is found liable under CERCLA. *See Rockwell*, 702 F. Supp. 1384 (N.D. Ill. 1988); *Ameritrust Co. Nat'l Assoc. v. The Lamson & Sessions Co.*, No. 1:92CV008, 1992 WL 738774 (N.D. Ohio May 21, 1992); *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 756 F. Supp. 713 (W.D.N.Y. 1991).

in a federal cost recovery or administrative action. The Seventh Circuit analyzed the "during or following" language in § 113(f)(1), and said that "a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available." *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997). While the Seventh Circuit's dicta, of course, does not bind this court, its textual analysis of § 113(f)(1) supports our interpretation of the contribution clause. This Circuit has similarly intimated that a § 106 or § 107(a) action must be pending or adjudicated for a party to pursue contribution costs. *See OHM*, 116 F.3d at 1574. Although *OHM* only addressed whether a PRP was limited to a contribution action, we nevertheless discussed the contours of § 113(f)(1), noting that it "allows parties to bring contribution actions at least as soon as they are sued under CERCLA." *Id.* at 1582. We then examined the common law roots of contribution, and implied that a party must be alleged or held liable before it can seek contribution: "Under the principle of 'contribution,' a tort-feasor *against whom a judgment is rendered* is entitled to recover proportional shares of judgment from other joint tort-feasors. *Id.* at 1582 (*citing* BLACK'S LAW DICTIONARY 328 (6th ed. 1990)) (emphasis added). Our reading of CERCLA's contribution provision is consistent with the common law definition: a contribution action can commence only if a party has already been found liable or faces potential liability.

A few district court cases have adopted the contrary view that a PRP can bring a § 113(f)(1) claim without first incurring or at least facing liability under either § 107(a) or § 106. *See Johnson County Airport Comm'n v. Parsonitt Co., Inc.*, 916 F. Supp. 1090, 1095 (D. Kan. 1996); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684 (N.D. Ind. 1997); *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971 (N.D. Ga. 1991). We disagree with the analysis in

these cases. For example, in *Johnson County Airport*, the district court allowed the contribution suit by relying on § 113(f)(1)'s savings clause. *See id.* (noting that the savings clause states that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under § 9606 or § 9607 of this title"). As we explained earlier in this opinion, the savings clause was only intended to preserve state-based contribution actions. Any other interpretation of the savings clause would render the enabling clause's "during or following" limitation a mere surplusage.

Aviall cites several other cases to support its contention that a § 106 or § 107(a) action is not required. None of them, however, is apposite. In *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), G&M filed a private CERCLA claim against Conoco/Vista, who filed a counterclaim seeking relief under § 107(a) and § 113(f)(1). Later, G&M voluntarily dismissed its CERCLA claim, while Conoco/Vista dropped its § 107(a) claim, leaving only its § 113(f)(1) counterclaim. Aviall points out that the Fifth Circuit allowed Conoco/Vista's § 113(f)(1) contribution action to proceed.

Aviall's reliance on *Geraghty & Miller* is misplaced. First, unlike Aviall—which had never been a defendant in any CERCLA action—Conoco/Vista was a CERCLA defendant at the time it filed its contribution claim against G&M, and thus had met § 113(f)(1)'s "during or following" requirement. *Cf. OHM*, 116 F.3d at 1582 (stating that a party may be "potentially liable" in the context of a contribution claim if it is "simply . . . being sued under the statute"). Second, while *Geraghty & Miller* contains some helpful language for Aviall, we did not directly address whether a contribution suit could proceed without a prior or pending CERCLA action. Rather, we considered the only issue presented to us: which statute of limitation applies if a party

seeks contribution but none of the triggering events occurs.[7] G&M never raised the issue of whether Conoco/Vista could pursue its contribution claim, and thus the court did not directly address it.

Similarly, *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), mentioned that a PRP might be able to undertake cleanup voluntarily. This dicta, however, was said only in the context of the appropriate statute of limitations period. *See also United Tech. Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994) (noting in dicta that "[i]t is possible that . . . a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of contribution under 42 U.S.C. § 9607(c)," but stating that it is "a matter on which we take no view").

Aviall also cites favorable language from *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 351 (6th Cir. 1998) ("It was enough that a plaintiff act under some compulsion or legal obligation to an injured when he or she discharged the payment"). The Sixth Circuit's ruling can be distinguished factually because the plaintiff in *Centerior* initiated a cleanup after the EPA had issued an administrative order under § 106. *See id.* at 346. Aviall has not received any such order from the EPA. Indeed, the *Centerior* court cautioned, "This case does not involve a PRP who initiated cleanup voluntarily without any governmental prodding, and we express no opinion" on that point. *Id.* at 352 n.10.

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7 The statute of limitations for a § 107(a) claim is three years, while it is six years for § 113(f)(1). The statute provides three triggering events for a § 113(f)(1) claim: a prior judgment, an administrative order, or a judicially approved settlement. None of the triggering events occurred in Conoco/Vista's case. The court thus addressed which statute of limitations applies in these "gap" cases.

Lastly, Aviall lists a string of cases where a PRP undertook cleanup and then filed for contribution, although only a state agency had issued an administrative order against the PRP. *See, e.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). Aviall thus argues that the TNRCC's administrative orders were sufficient to allow it to proceed with its § 113(f)(1) claim. The facts section of these opinions admittedly mention **[sic]** only state agency enforcement. However, these cases are not dispositive for the simple fact that the parties for whatever reason did not raise the specific issue presented in our case: whether a PRP can seek contribution in the absence of a CERCLA action against it.[8]

D

Finally, Aviall makes a general policy argument that the district court's ruling would discourage voluntary cleanups because parties would not be able to seek contribution unless they were actually sued or faced EPA administrative orders. Some courts have conceded this disincentive, but have nevertheless ruled that Congress required this result. *See Rumpke*, 107 F.3d at 1240 ("We acknowledge, as other courts have, that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires, however"). We agree that the text trumps policy

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8 For the same reason, we reject Aviall's argument that the Seventh Circuit in *PMC*, 151 F.3d at 610, implicitly overruled *Estes*, 16 F. Supp. 2d at 983, which held that a § 113(f)(1) suit is invalid without a § 106 or § 107(a) action. In *PMC*, one party cleaned up the sites at the behest of the state agency and then sought contribution, but the opposing party never raised or disputed whether such contribution actions were permissible.

preferences, and that we cannot substitute Congress' wishes with our own.

In any event, we believe that our interpretation of the statute is wholly consistent with the policy goals of CERCLA. When Congress passed SARA, it did not intend to create an expansive federal cause of action. As the legislative history shows, Congress wanted only a limited right of contribution when parties are found or alleged to be liable under CERCLA. *See* S. REP. NO. 99-11 at 44 (stating that § 113(f)(1) "clarifies and confirms the [judicially recognized] right of a person held jointly and severally liable" to seek contributions). It seems unlikely that Congress enacted a contribution right broad enough to encompass Aviall's situation, where neither the federal government nor any private party has filed a CERCLA action against it, and the EPA has not designated Aviall's Facilities as contaminated sites. Furthermore, Congress probably did not intend to go beyond the traditional common law definition of contribution in drafting CERCLA's contribution provision. *See OHM*, 116 F.3d at 1574 (defining the common law definition of contribution as requiring a pending or prior judgment). In short, we do not believe that Congress wanted to afford a federally-based contribution right to a party merely because a state agency had found it to have violated a state environmental law.

We also doubt that our interpretation of § 113(f)(1) will necessarily discourage voluntary cleanups. Parties may be able to rely on state environmental laws to recover costs from other liable parties. Indeed, Aviall is alternatively seeking contribution from Cooper based on two Texas statutes. That option remains open despite our ruling today.

IV

After examining CERCLA's text, legislative history and case law, we hold that a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it.

AFFIRMED.

WIENER, Circuit Judge, dissenting:

In reaching its holding that a PRP can only sue another PRP on a § 113(f)(1) contribution claim if a § 106 administrative order or § 107(a) action has been brought against it, the panel majority claims to have applied a "plain-meaning" analysis to the statute; yet it obviously has glossed over clear statutory language declaring that "[n]othing in [§ 113(f)(1)] shall diminish the right of any person to bring an action for contribution *in the absence of a civil action under [§ 106] . . . or [§ 107(a)][.]*"[9] I respectfully dissent because I am convinced that a full and fair reading of § 113(f)(1) in the context of CERCLA as a whole — and without judicially legislating into that section of the statute two words that are indispensable to the majority's position but that Congress elected to omit — does not require a PRP seeking contribution from another PRP for CERCLA liability to wait until a § 106(a) order or § 107(a) action is filed against it.

I. THE TEXT

Neither I nor anyone else can quarrel with the majority's incantation of the truism that when we analyze a

9 42 U.S.C. § 9613(f)(1) (emphasis added).

statute we must look first and foremost to its language. Accordingly, I begin with the full text of § 113(f)(1):

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [§ 107(a)] of this title, during or following any civil action under section 9606 [§ 106] of this title or under section 9607(a) [§ 107(a)] of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.[10]

We cannot simply analyze statutory terms in a vacuum, however, but are constrained to consider them in the context of the statute as a whole.[11] The majority perverts this canon of statutory construction by seizing on and unduly elevating

10 *Id.*

11 *See Gade v. National Solid Wastes Management Assn.*, 595 U.S. 88, 99 (1992) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (internal quotation marks and citations omitted, brackets in original).

the phrase "during or following" in § 113(f)(1) to the pedestal of exclusivity while (1) trivializing Congress's palpable (and presumably intentional) refusal to insert the word "only" to modify the phrase "during or following any civil action" in the first sentence of this section or to insert the word "state" to modify the phrase "action for contribution" in the final sentence (the "savings clause"), (2) ignoring the universally accepted legal meaning of "civil action" as congruent with and limited to "lawsuit," (3) shunning the full import and significance of the contextually critical but statutorily undefined term "contribution," and (4) refusing to recognize the breadth of the savings clause. I submit, and shall proceed to demonstrate, that these distortions of the methodology of statutory construction mortally wound the majority's announced exercise of that process.

For openers, nowhere does the plain language of the statute specify that actions for contribution are allowed "only" during or following litigation under CERCLA. Thus the majority's holding — "that a party can seek a § 113(f)(1) contribution claim *only* if there is a prior or pending federal § 106 or § 107(a) action against it" (emphasis added) — boldly rewrites the statute by imposing the extra-congressional restriction that the savings clause itself affirmatively rejects: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution *in the absence of a civil action under [§ 106] of this title or [§ 107(a)] of this title*."[12] I find baffling the majority's dismissive reference to Aviall's argument — that the absence of the word "only" from the statute at least raises a question as to whether the "during or following" language is exclusive — as "inconsistent with our canons of statutory construction" because I am aware of no canon that gives the

12 *See* 42 U.S.C. § 9613(f)(1) (emphasis added).

judiciary a license to rewrite statutory language. To the contrary, it is not our province to add even one word to a statute — here, to restrict its reach — when Congress itself has chosen not to include that word and thus not to limit the scope of the statute. It is obvious that, by inserting the word "only" into the statute, the majority has converted a permissive provision to one of exclusivity. When Congress wants to make a statute exclusive, it certainly knows how to do so.[13]

The majority's related attempt to cabin the savings clause by insisting that it means nothing more than that "the statute does not affect a party's ability to bring contribution actions based on *state* law" is yet another judicial trespass on the legislative turf. In this instance, the majority's interpretation of the savings clause requires still another insertion of an omitted word — "state" — thereby creating a distinction that Congress did not see fit to make and that we of the "Third Branch" should not presume to legislate. When Congress intends to distinguish between federal and state law, it certainly knows how to do so. For instance, CERCLA's general savings clause provides,

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under *other Federal or State law, including common law*, with respect to releases of hazardous substances or other pollutants or contaminants.[14]

13 *See, e.g.*, 2 U.S.C. § 437d(e) ("Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.").

14 42 U.S.C. § 9652(d).

If, as the majority contends, Congress meant for the savings clause merely to acknowledge that a party seeking contribution for environmental clean-up may bring a *state* action in response to *state* orders or judgments (something Congress need not say or do because — short of making CERCLA preemptive — it cannot prohibit it) surely Congress would have made that distinction explicit, as it did in CERCLA's general savings clause.[15]

Second, the majority's own conclusion that a PRP seeking contribution from other PRPs "must have a pending or adjudged § 106 *administrative order* or § 107(a) cost recovery action against it" (emphasis added) puts the lie to its contorted reading of the savings clause. Section 113(f)(1) states that a PRP may seek contribution "during or following any *civil action* under [§ 106] or under [§ 107(a)]."[16] Administrative orders are not "civil actions." They are not "actions" at all.[17] And no amount of saying so can make it so. The majority's Orwellian insistence that the term "civil actions" includes "administrative orders" stretches the language of the statute beyond the breaking point — needlessly, because the savings clause makes clear that "the

15 The majority's reliance on *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998), is thus misplaced, as the analysis in that case focused on CERCLA's general savings clause with its express preservation of state-law claims.

16 *See* 42 U.S.C. § 9613(f)(1) (emphasis added). Section 106(a) authorizes an administrative order requiring a private party to clean up a site. *See* 42 U.S.C. § 9606(a). If the party refuses to do so, then § 106(b)(1) authorizes the EPA to bring an action in federal district court to enforce the order. *See* 42 U.S.C. § 9606(b)(1).

17 *See* Black's Law Dictionary 28 (6th ed. 1990) ("['Action'] in its usual legal sense means a lawsuit brought in a court[.]").

absence of a civil action under [§ 106]" is not fatal to a PRP's attempt to seek contribution under § 113(f)(1).[18]

The majority cannot have it both ways. If, as the majority claims, the language of the savings clause means only that § 113(f)(1) does not preempt state-law contribution claims, then not even an abatement order issued pursuant to § 106(a) triggers a PRP's right to seek contribution under § 113(f)(1), because such an administrative order is not a "civil action" during or following which a contribution claim may only, as the majority would have it, be brought. No amount of interpretive sleight-of-hand on the majority's part can avoid this logic. Thus the majority's assertion that a PRP can file a contribution claim "if the government has ordered it to clean up contaminated sites under § 106" flatly contradicts its own (erroneous) interpretation of the savings clause as merely preserving state-law remedies. When properly interpreted, the language of the savings clause makes clear that a PRP may "bring an action for contribution *in the absence of a civil action* under [§ 106] . . . or [§ 107(a)]"[19] — and I see nothing in the statute to justify the majority's dubious distinction between *federal* administrative orders, which, as even the majority agrees, trigger contribution claims under § 113(f)(1), and *state* administrative orders which, the majority has decreed, somehow do not.

Third, the majority unquestionably misspeaks by adopting its own uniquely narrow definition of the critical statutory term "contribution." As § 113(f)(1) does not define the term "contribution," we must abide by the well-established maxim of interpretation that legal terms not

18 *See* 42 U.S.C. § 9613(f)(1).

19 *See* 42 U.S.C. § 9613(f)(1) (emphasis added).

defined in a statute are ordinarily presumed to convey their customary legal meaning and accord the term "contribution" its full common-law meaning: "[W]here Congress borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken[.]"[20] This tenet of statutory construction is especially important when, as here, Congress legislates in an area formerly governed by federal common law. As we have explained,

> Section 107 was the sole statutory basis for recovery of response costs in the original CERCLA statute, which contained no provision for apportioning costs among PRPs. Cases under the original statute threatened minor polluters with joint and several liability, which prompted courts to find an implicit, federal common law right to contribution. The SARA amendments, including section 113, codified the federal common law right of contribution. A principal objective of the new contribution provision was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost

20 *Morisette v. United States*, 342 U.S. 246, 263 (1952).

> that may be greater than its equitable share under the circumstances."[21]

We are constrained to "take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except when a statutory purpose to the contrary is evident."[22]

The term "contribution," as this court has explained, "is best understood in its customary sense as a term of art referring to actions brought among potentially responsible parties."[23] Black's Law Dictionary defines "contribution" as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear."[24] Similarly, the Restatement (Second) of Torts provides, "when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered against all or any of them*"[25] and even

21 *OHM Remediation Services v. Evans Cooperage Co.*, 116 F.3d 1574, 1581 (5th Cir. 1997) (Garza, J.) (internal citations omitted) (*quoting* S. Rep. No. 99-11, at 44 (1985) ("[Section 113] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.").

22 *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks and citation omitted).

23 *OHM*, 116 F.3d at 1582 (emphasis added).

24 Black's Law Dictionary at 328 (emphasis added).

25 Restatement (Second) of Torts § 886A (2d ed. 1979) (emphasis added).

"without . . . suit against [them]."[26] American Jurisprudence Second elaborates:

> The equity for contribution arises at the time of the creation of the relationship between the parties which gives rise to the right and ripens into a cause of action for reimbursement in favor of a party when, under a legal duty, he satisfies, by payment or otherwise, more than his just proportion of the common obligation or liability. Or, stated in terms applicable to actions at law, the implied promise to contribute is considered as made at the time the common liability is assumed, *and the right to sue thereon arises when a party has paid the whole of the obligation or more than his share thereof.*[27]

None of these authorities requires, as a condition precedent, that a party be sued or adjudged liable before seeking contribution; rather, the right to seek contribution arises independently when one tort-feasor, acting under a legal duty, discharges more than his fair share of a liability shared by joint tort-feasors.

I acknowledge that some jurisdictions have statutorily restricted the right to seek contribution to actions between

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26 *Id.* at § 886A cmt. b.

27 *See* 18 Am. Jur. 2d *Contribution* § 9 (1985) (emphasis added) (footnotes omitted).

tort-feasors against whom judgment has been rendered.[28] Eschewing any such limitation, however, the "during or following" language in § 113(f)(1) confirms that a PRP need not wait until it is hit with a final judgment in a court of law to seek contribution from other PRPs for CERCLA liability. Far from restricting the right to seek contribution, the "during or following" language embraces the more expansive Restatement view that a tort-feasor may seek contribution from joint tort-feasors "even though judgment has not been recovered against all or any of them."[29]

One might argue, as does the majority, that by expressly providing for contribution "during or following" a civil action under § 106 or § 107(a), Congress impliedly excluded the common-law right to seek contribution in the absence of suit. Obviously mindful of the possibility of such an overly restrictive reading, Congress took explicit care to add the savings clause, thereby foreclosing this narrow construction of the statute: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution *in the absence of a civil action under [§ 106] of this title or [§ 107(a)] of this title.*"[30]

Unlike the majority, I read the savings clause to mean precisely what it says: *Nothing* in § 113(f)(1) — particularly not its "during or following" language — diminishes the right of any person to bring an action for contribution *in the absence of a civil action under § 106 or § 107(a).* Just as the "during or following language" confirms that the class of those who have the "right . . . to bring an action for

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28 *See* W. Page Keeton Et Al., *Prosser and Keeton on the Law of Torts* § 30, at 338 (5th ed. 1984) (collecting cases).

29 *See* Restatement (Second) of Torts at § 886A.

30 *See* 42 U.S.C. § 9613(f)(1) (emphasis added).

contribution" is not limited to PRPs against whom a judgment already has been rendered, the savings clause clarifies that a PRP may seek contribution in the absence of suit so long as the prerequisites for a contribution claim have otherwise been met.

Rather than deal squarely with this argument, the majority opts to mischaracterize it. My argument is neither that Congress "deliberately" made the enabling provision "unclear," nor that it intended the savings clause to "clarify" any such ambiguity. To the contrary, my argument tracks Congress's own stated intentions of "clarif[ying] and confirm[ing]" the federal common-law right to seek contribution from other potentially liable parties under CERCLA. Thus I maintain that the "during or following" language itself clarifies, in the face of contrary authority, that a party need not wait until judgment is rendered to seek contribution under § 113(f)(1).

The savings clause, then, serves as a prior restraint to rebut any unintended inference of *expressio unius* lest some court in the future try to ascribe that maxim to the language. Stated differently, the savings clause rules out any construction that would purport to read "during or following" as the exclusive portal through which a contribution claim must pass. Particularly in the absence of the word "only" preceding the phrase "during or following," the savings clause makes abundantly clear that "during or following" are but two of the many times and circumstances when one PRP may seek contribution from another.

The majority's reliance on *Resolution Trust Corp. v. Miramon*[31] is thus misplaced. The statute at issue in that case *abrogated* a federal common-law provision, whereas in our

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31 22 F.3d 1357 (5th Cir. 1994).

case, section § 113(f)(1) "*confirms*" the federal common law of contribution under CERCLA. Furthermore, the savings clause at issue in *Miramon* expressly stated that "[n]othing in this paragraph shall impair or affect any right of the [Resolution Trust] Corporation under *other applicable law*."[32] Focusing on the term "other," we concluded that the savings clause did not preserve federal common law actions for simple negligence when the enabling provision of the statute solely referenced actions for gross negligence:

> The savings clause provides that the RTC's rights under *other* applicable law will not be impaired or affected. This clearly implies that the RTC's rights under *some* law is being impaired or affected. Under the RTC's construction of the savings clause, though, there is no law that is impaired or affected because all previous common law remains effective and [the statute] merely grants the RTC an additional option. Had Congress intended this result it would have drafted the clause to read that "[n]othing in this paragraph shall impair or affect any right of the Corporation under any applicable law.[33] **[sic]**

The language of § 113(f)(1)'s savings clause, however, is even more expansive and explicit in preserving the PRP's common-law right to bring an action for contribution in the

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32 *See* 12 U.S.C. § 1821(k) (emphasis added).

33 *Miramon*, 22 F.3d at 1361 n.6.

absence of suit: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] of this title or [§ 107(a)] of this title."[34] Unlike the statute at issue in *Miramon*, section 113(f)(1) contains no language even remotely suggesting that the "during or following" language is meant to be exclusive or restrictive. Neither is there anything that expressly or implicitly limits the savings clause to *state* "actions." In view of Congress's express intention to "confirm" the federal common law of contribution under CERCLA, I must disagree with the majority when it insists that we should read into § 113(f)(1) a limitation on the right to seek contribution that a straightforward reading of the plain language of the statute expressly rejects.

II. LEGISLATIVE HISTORY

The majority's resort to legislative history to shore up its problematical reading of the statute aptly demonstrates the pitfalls of traversing such uncertain terrain, especially when — as here — there is no claim or finding of ambiguity. In support of its bald assertion that the legislative history "overwhelmingly supports" its reading of the statute, the majority fecklessly relies on House and Senate reports that address markedly different, and ultimately abandoned, versions of what would later become the enacted version of § 113(f)(1). The subsequently abandoned version under consideration by the Senate at that time provided that "*[a]fter judgment* in any civil action under section 106 or [§ 107(a)], *any defendant* held liable or potentially liable in the action may bring *a separate action* for contribution against any other person liable or potentially liable under [§ 107(a)]."[35]

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34 *See* 42 U.S.C. § 9613(f)(1).

35 S. Rep. No. 99-11, at 103 (1985) (emphasis added). The savings clause read as follows: "Except as provided in paragraph (4) of the subsection, this subsection shall not impair any right of indemnity under existing law." *Id.*

Similarly, the subsequently abandoned version under consideration by the House at that time provided that "any *defendant alleged or held to be liable* in an action under section 106 or section 107 may bring an action for contribution or indemnity against any other person liable to [sic] potentially liable."[36] If, despite the absence of ambiguity in the statute, the majority would invoke legislative history (generally perceived to be a sign of weakness in a proposed reading of a statute), it should at least limit its reliance to that part of the history that addresses the version of the legislation that Congress actually adopted into law.

By any standard, the language of the statute ultimately enacted by Congress is more permissive than either of the more restrictive versions on which the legislative history cited by the majority comments. The legislative history does not reveal reasons for these changes, and I hesitate to place too much weight on what may be a slim reed. At a minimum, though, it can hardly be said — at least not without blushing — that the legislative history supports the majority's contention that "Congress . . . made it clear in passing SARA that it intended only a *limited* federal right of contribution."

The majority would also make much of the fact that the legislative history "never mentions that SARA intended to allow contribution in the absence of either a pending or prior § 106 or § 107(a) action." I am mystified by the majority's willingness to cast aside its healthy skepticism

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36 H.R. Rep. No. 99-253, pt. 1, at 188 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2862 (emphasis added).

about legislative history to read so much into the *absence* of legislative discussion on this issue, especially when the plain language of the statute, through its savings clause, *expressly* contemplates actions for contribution in the absence of civil actions under § 106 or § 107(a). Surely the majority has not forgotten Justice Scalia's admonition that we are not concerned with what Congress *intended*, but what it *enacted*: "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[37]

The one thing — perhaps the only thing — that is clear from the legislative history is that § 113(f)(1) "clarifies and confirms" the federal common-law right to seek contribution from other potentially liable parties under CERCLA.[38] Taken together, (1) Congress's intentional omission of "only" before "during or following," and of "state" before "action in the savings clause, (2) the expansive common-law understanding of the term "contribution" to include actions instituted prior to suit or judgment, (3) the necessity of the "during or following" language as an express re-affirmation of the right to seek contribution before judgment, and (4) the broad language of the savings clause, convince me that the plain and unambiguous language of the statute enacted by Congress does permit a PRP, such as Aviall, to seek contribution in the absence of a civil action under § 106 or § 107(a) as well as during or following such an action.

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37 *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

38 S. Rep. No. 99-11, at 44 (1985).

III. CASE LAW

The majority admits, as it must, that in a "string of cases," federal courts of appeal (including this one) have permitted § 113(f)(1) contribution suits to go forward in the absence of civil actions under § 106 or § 107(a).[39] Most recently, in *Crofton Ventures LP v. G & H Partnership*,[40] the Fourth Circuit, in an opinion authored by Judge Niemeyer, allowed a § 113 suit by a PRP who, just like Aviall, had notified a state environmental agency of the contamination and then cleaned up the facility. It was of no moment in *Crofton* that neither an administrative charge nor a § 106 or § 107 action had been brought against the plaintiff in that case.

True enough, whether a party may seek contribution under § 113(f)(1) in the absence of a CERCLA action against it was not a contested issue in any of these cases. But albeit tacit, that phenomenon only underscores the common understanding among courts and litigants alike that the plain language of § 113(f)(1) does not require a PRP to wait until it is haled into court to seek contribution under the statute.

Faced with this line of federal appellate cases, what does the majority choose to rely on but a district court case — from another circuit — *Estes v. Scotsman Group, Inc.*,[41]

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39 *See, e.g., Amoco Oil v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (permitting contribution claim under § 113(f)(1) to proceed in the absence of a civil action under § 106 or § 107(a)); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998); *Sun Company, Inc., v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997).

40 No. 00-1517, 2001 WL 829885 (4th Cir. July 24, 2001).

41 16 F. Supp. 2d 983 (C.D. Ill. 1998).

which in turn relied on dicta from the Seventh Circuit's opinion in *Rumpke of Indiana, Inc. v. Cummins Engine Co,* **[sic]** *Inc.*:[42]

> We acknowledge, as other courts have, that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires, however.[43]

In *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*,[44] however, a different district court in the same circuit refused to "be guided by the equivocal dicta in *Rumpke*" and held that "[i]n light of the express language of Section 113(f)(1) . . . [a] PRP can bring a section 113 action even when no prior or pending section 106 or 107 civil actions have occurred."[45]

Similarly, in *Mathis v. Velsicol Chemical Corp.*,[46] a district court in the Eleventh Circuit rejected an attempt to plead, as an affirmative defense to a § 113(f)(1) claim, that "no civil action under [§ 106] or [107(a)] is pending."[47]

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42 107 F.3d 1235 (7th Cir. 1997).

43 *Id.* at 1241.

44 974 F. Supp. 684 (N.D. Ind. 1997).

45 *See id.* at 691.

46 786 F. Supp. 971 (N.D. Ga. 1991).

47 *Id.* at 975. The plaintiffs' state-law claims alleged nuisance and trespass to land.

Underscoring the broad language of the savings clause, the *Mathis* court held that § 113(f)(1) "by its plain terms and meaning prevents . . . [the maintenance of] a defense concerning the pendency of a civil action under CERCLA."[48] Likewise, in *Johnson County Airport Comm'n v. Parsonitt Co., Inc.*,[49] the district court held that "nothing in the language of section 113(f)" prohibits a PRP from asserting claims for contribution under the statute in the absence of a civil action under § 106 or § 107(a).[50] Most recently, in *Coastline Terminals of Connecticut, Inc. v. USX Corp.*,[51] the district court held that a § 113(f)(1) claim is not barred merely because the PRP has not been threatened with liability in the form of a § 106 or § 107 action.[52] The majority begrudgingly acknowledges these cases but makes little effort to contend with their reasoning and analysis.

Instead, the majority cobbles together a hodgepodge of other district court cases, none of which is apposite. For example, the district court in *Deby, Inc. v. Cooper Indus.*[53] dismissed the PRP's contribution claim as "premature and improper" because the PRP had "yet to be found liable" in a CERCLA action then actually pending against the PRP in another district court. The *Deby* court therefore concluded that "[i]t would run contrary to judicial economy, efficiency,

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48 *Id.*

49 916 F. Supp. 1090 (D. Kan. 1996).

50 *See id.* at 1095.

51 No. 3:00CV1698(WWE), 2001 WL 844722 (D. Conn. June 12, 2001).

52 *See id.* at *3.

53 No. 99C2464, 2000 WL 263985 (N.D. Ill. Feb. 29, 2000).

and consistency to have t[w]o courts determine Deby's liability."[54]

The majority likewise cites the district court opinion in *United States v. Compaction Sys. Corp.*[55] for support, but that case merely held that the act of settling with the United States satisfies § 113(f)(1)'s liability requirement even though there has been no formal admission of liability.[56] In the same vein, the majority cites to the district court's opinion in *Southdown v. Allen*[57] even though it has no applicability whatsoever to the instant case. In *Southdown*, the defendants argued that the plaintiff had abrogated the right to seek cost recovery or contribution under CERCLA through *contract*; discussion in that case appropriately centered on the defendants' argument that the plaintiff's cleanup costs had been incurred "voluntarily" pursuant to a contractual agreement between the parties and were therefore unrecoverable under § 113(f)(1).[58] In short, none of these district court cases from other circuits either supports the majority or offers any help in resolving the issue of first impression presented here: whether, in the absence of a civil action under § 106 or § 107(a), the statute permits a PRP who has incurred cleanup costs pursuant to a state administrative order to bring a § 113(f)(1) contribution action in federal court.

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54 *See id.* at *5.

55 88 F. Supp. 2d 339 (D.N.J. 1999).

56 *See id.* at 351.

57 119 F. Supp. 2d 1223 (N.D. Ala. 2000).

58 *Id.* at 1245.

I recognize that the district court in *Rockwell Intern. Corp. v. IU Intern. Corp.*[59] rejected my view that § 113(f)(1) permits claims for contribution in the absence of a federal civil action under § 106 or § 107(a); *but* it also rejected the majority's view that the "during or following" language "precludes any claim sounding in contribution except when brought by a party defending against or found liable in a [§ 106] or [§ 107(a)] action."[60] In *Rockwell*, the plaintiff sought a declaratory judgment under § 113(f)(1) in the event that it was later held liable for "whatever costs it may incur in the future as a result of the actual or threatened release of hazardous substances[.]"[61] The district court in Illinois permitted the plaintiff's § 113(f)(1) declaratory judgment action to proceed on the theory that the "during or following" language does not limit the right to seek contribution but merely "recogni[zes] that the actual payment of damages cannot occur until [the plaintiff is found liable]."[62] *Rockwell*, then, does not answer, one way or the other, the core question of this appeal: whether a party that has already incurred cleanup costs and conceded to being a PRP can seek contribution from another putative PRP under § 113(f)(1) in the absence of an ongoing or adjudged § 106 or § 107(a) action against it.

The majority finally turns to this court's own precedent and strains mightily to glean from it an "intimat[ion] that a § 106 or § 107(a) action must be pending or adjudicated for a party to pursue contribution costs" from

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59 702 F. Supp. 1384 (N.D. Ill. 1988).

60 *See id.* at 1389.

61 *Id.* at 1386.

62 *Id.* at 1389.

dicta in our *OHM* opinion.[63] Reminiscent of the Emperor's new clothes, however, that opinion suggests no such thing. Directly to the contrary, in fact, what we actually observed in *OHM* is that § 113(f)(1) "allows parties to bring contribution actions *at least as soon* as they are sued under CERCLA."[64] Thus *OHM* recognized the distinct possibility — not before us in that case — that contribution could be sought even earlier than the day on which a § 113(f)(1) action is filed. Try as I might, I simply cannot see how the majority can read the phrase "at least as soon as" to indicate anything other than a recognition of the distinct possibility that a § 113(f)(1) action might be brought even earlier than the filing of a civil action under § 106 or § 107(a).

Neither does our discussion of the common-law principle of contribution in *OHM* "imply" that a party must be alleged or held to be liable before it may seek contribution under § 113(f)(1). In *OHM*, we observed that the term "contribution" refers to "an action by a [PRP] to recover from another [PRP] that portion of its costs that are in excess of its pro rata share of the aggregate response costs[.]"[65] This definition comports with the authoritative view that the right to sue for contribution "arises when a party has paid the whole of the obligation or more than his share thereof[.]"[66]

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63 *See OHM*, 116 F.3d 1574.

64 *See id.* at 1582 (emphasis added).

65 *Id.* (internal quotation marks and citation omitted)

66 *See* 18 Am. Jur. 2d *Contribution* at § 9. *See also McLochlin v. Miller*, 139 Ind. App. 443, 217 N.E.2d 50, 53 (1966) ("It is true that payment must be made under compulsion to entitle payor to contribution. But such pressure exists sufficiently to establish the right to contribution whenever there is a legal obligation to pay. The claimant is not obliged to wait until suit is brought to claim compulsion.").

Contrary to the majority's contentions, the definition of "contribution" adopted by *OHM* and set forth in Black's Law Dictionary — the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear"[67] — does not require that a party either be *alleged* to be or *held* to be liable before it may seek contribution; only that it in fact *be* liable, *i.e.*, "bound or obliged in law or equity."[68] The majority only compounds its error by misconstruing the example of "contribution" provided by Black's Law Dictionary — "Under [the] principle of 'contribution,' a tort-feasor *against whom a judgment is rendered* is entitled to recover proportional shares of judgment from other tort-feasors"[69] — as an exclusive, rather than merely illustrative, application of the principle.

In short, the majority's claim of widespread jurisprudential support for its textual analysis vanishes like the mist when exposed to the sunshine of objective scrutiny. If one robin does not make a spring, then surely a light dusting of equivocal district court cases and a wisp of dicta from another circuit does not persuasive authority make. The paucity of case law — particularly federal appellate case law — directly on point mandates a holding that the plain language of § 113(f)(1) expressly permits an action for contribution to be brought "in the absence of a civil action" under § 106 or § 107(a).

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67 Black's Law Dictionary at 328.

68 *See id.* at 915.

69 *Id.* (emphasis added).

IV. POLICY

The majority mouths adherence to the prudential rule that when the meaning of statutory language is clear, courts "need not determine which way . . . various policy arguments cut."[70] Nevertheless, the same majority goes on to claim, astonishingly, that its interpretation of the statute furthers rather than frustrates the policy goals of CERCLA that this court has identified as "facilitat[ing] the *prompt* cleanup of hazardous waste sites and . . . shift[ing] the cost of environmental response from the taxpayers to the parties who benefitted from the wastes that caused the harm."[71] The majority weakly contends that it "seems unlikely that Congress enacted a contribution right broad enough to encompass . . . the situation[] where neither the federal government nor any private party has filed a CERCLA action . . . and the EPA has not designated [the facilities] as contaminated sites." But such "logic" is exposed as flawed by the undeniable recognition that the overarching goal of CERCLA is to create strong incentives for responsible parties to perform cleanups of sites without waiting for the hammer of litigation to drop. In my view, the majority's decision runs directly counter to CERCLA's goal of prompt cleanups. In reality, it *encourages* PRPs to postpone, defer, or delay remediation and to "lie behind the log" until forced to incur cleanup costs by governmental order, either administrative or court.

Irrespective of the policy arguments, though, if the text of § 113(f)(1), legitimately read, limited the right to seek

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70 *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. ___ , 121 S. Ct. 1835, 1843 (2001).

71 *See OHM*, 116 F.3d at 1578 (emphasis added).

contribution to those PRPs against which pending or adjudged § 106 or § 107(a) actions were extant, I would be the first to acknowledge and enforce that limitation. As I am convinced, however, that the plain language of the statute creates no such limitation but, to the contrary, expressly permits an action for contribution to be brought "in the absence of a civil action" under § 106 or § 107(a), I must respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES, INCORPORATED,	)	
Plaintiff-counterdefendant,	)	Civil Action No. 3:97-CV-1926-D
v.	)	
COOPER INDUSTRIES, INC.,	)	
Defendant-counterplaintiff.	)	

MEMORANDUM OPINION
AND ORDER

Plaintiff-counterdefendant Aviall Services, Inc. ("Aviall") purchased the aircraft engine maintenance business of defendant-counterplaintiff Cooper Industries, Inc. ("Cooper") and now seeks to recover from Cooper for environmental cleanup expenditures that Aviall undertook voluntarily at four sites acquired pursuant to the asset purchase agreement. Aviall sues primarily on state-law contract and statutory theories, but also seeks relief based on § 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1), the CERCLA contribution provision. Aviall also requests a declaratory judgment under 28 U.S.C. § 2201, the federal Declaratory Judgment Act. The court holds that § 113(f)(1) relief is unavailable where, as here, Aviall is not the subject of a prior or pending CERCLA enforcement action, and dismisses the claim without prejudice. The court holds that 28 U.S.C. § 2201 is not an independent grant of federal question jurisdiction. Having dismissed Aviall's

federal claim, and absent diversity jurisdiction, the court declines in its discretion to exercise supplemental jurisdiction over Aviall's state-law claims, which clearly predominate in this case and are within the expertise of Texas courts, and dismisses the claims without prejudice to their being prosecuted in state court.

I

In 1981 Cooper sold its aircraft engine maintenance business to Aviall pursuant to an asset purchase agreement.[1] Several years later, Aviall discovered extensive contamination of the soil and groundwater at the facilities it had acquired. It voluntarily performed certain cleanup operations. Aviall sues Cooper to recover the costs it has already incurred and those that it anticipates incurring in the future. Aviall seeks relief based on theories of (1) breach of contract, (2) breach of express warranty, (3) contractual indemnification, (4) declaratory judgment, (5) contribution under CERCLA § 113(f)(1), (6) contribution under § 361.344(a) of the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.344(a) (West 1992 & Supp. 2000), (7) contribution under § 26.3513(j) of the Texas Water Code, Tex. Water Code Ann. § 26.3513(j) (West 1998 & Supp. 2000), (8) quantum meruit, and (9) attorney's fees. Cooper counterclaims for contribution under CERCLA § 113(f)(1) and for contractual indemnification and breach of contract under Texas state law.

Aviall now moves for partial summary judgment and Cooper moves for summary judgment. Although their

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[1] In 1982 they executed an agreement and mutual release that made purchase price adjustments and settled various ongoing disputes that had arisen subsequent to the asset purchase agreement.

motions do not mirror each other in all respects, both parties seek summary judgment concerning Aviall's claim for contribution under CERCLA § 113(f)(1). The court heard oral argument on January 5, 2000 and now enters this decision.

II

Aviall characterizes this lawsuit as "primarily, but not exclusively, a contract case." P. Apr. 16, 1999 Mem. at 1. In the alternative to its breach of contract claims, Aviall seeks contribution under CERCLA § 113(f)(1). *See id.* at 34.

A

Congress enacted CERCLA in 1980 and in 1986 amended it by the Superfund Amendments and Reauthorization Act ("SARA"). *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997). CERCLA's goal is to facilitate the cleanup of hazardous waste sites and to shift the cost of environmental response from taxpayers to the parties responsible for the pollution. *Id.*

CERCLA § 107(a) outlines liability under the statute for four classes of "covered" persons: (1) current owners and operators of vessels or facilities, (2) past owners or operators of any facility at which hazardous substances were disposed of, (3) persons who by contract or agreement arranged for disposal or transport of hazardous substances, and (4) persons who accept or accepted any hazardous substance for transport to disposal or treatment facilities. Parties possibly liable as "covered" persons under § 107(a) are commonly referred to as potentially responsible parties ("PRPs"). CERCLA § 107(a)(4) creates liability when there is a hazardous substance release or potential release that results in

incurring response costs. Section 107(a)(4) provides that "covered" persons

> shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]

The 1986 SARA amendments created an express provision for contribution by adding CERCLA § 113(f)(1), which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§ 106] or under [§ 107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107].

B

Aviall asserted in its original complaint separate causes of action under CERCLA §§ 107(a) and 113(f)(1). In

its second amended complaint, Aviall has dropped the independent § 107(a) claim and instead asserts a so-called "combined" § 107(a) and § 113(f)(1) claim.[2] Aviall does not maintain that there is a prior or pending CERCLA enforcement action against it, and Cooper denies liability under § 107(a). Aviall nevertheless seeks contribution from Cooper pursuant to § 113(f)(1).

CERCLA § 107(a)(4)(B) imposes liability on "covered" persons for "any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]" Section 113(f)(1) creates a mechanism for applying the broad liability provision of § 107(a)(4)(B). 107(a)]." The plain language of § 113(f)(1) provides that contribution claims may only be brought "*during* or *following* any civil action under [§ 106] or under [§ 107(a)]." (emphasis added).

The last sentence of § 113(f)(1), which provides that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]," does not command a different result. This proviso is likely intended to ensure that parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law. *See Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) ("[W]e view the last sentence of [§ 113(f)] not as derogating from the requirement that a finding of liability precede any award in contribution but as an assurance that

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[2] In response to questioning during oral argument, Aviall explained that the § 107 component of the combined claim is asserted "as an element of the contribution cause of action under 113[.]" In other words, Aviall relies on § 107 to the extent necessary to maintain a viable § 113(f)(1) contribution claim, not as an independent cause of action against Cooper.

contribution remains available in other contexts, such as through Rockwell's claims for contribution under Illinois law."); *accord Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983, 989-90 (C.D. Ill. 1998) (quoting *Rockwell Int'l Corp.*, 702 F. Supp. at 1389).

In *Estes* the plaintiff acquired a contaminated industrial site and undertook remedial activities both on its own and at the direction of the Illinois Department of Environmental Protection. *Estes*, 16 F. Supp. 2d at 985. The plaintiff later sought to recover response costs from the defendant (the previous landowner) by bringing CERCLA cost recovery actions under §§ 107(a) and 113(f). *Id.* at 986. Both parties were designated PRPs for the site. *Id.* at 987. The district court granted summary judgment on both claims, concluding that the plaintiff could neither maintain the § 107(a) action, because it was a PRP itself, nor maintain a § 113(f) action, because there was no prior or pending § 106 or § 107 action. *Id.* at 987.

Likewise, in *Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co.*, 1992 WL 738774 (N.D. Ohio May 21, 1992), a plaintiff voluntarily undertook remedial actions at a site it had purchased. It then sought to recover response costs from the defendant, a prior landowner, pursuant to CERCLA §§ 107(a) and 113(f). *Id.* at *2. On defendant's motion to dismiss, the court upheld the plaintiff's § 107(a) claim but dismissed the § 113(f) claim. *Id.* at *2-*3. The court held that where the "[plaintiff] does not, and cannot, point to a third party that has threatened it with potential liability. . . [plaintiff's] invocation of the CERCLA provisions that allow a defendant to seek contribution is inapposite." *Id.* at *3.

The holdings in *Estes* and *Ameritrust Co.* are consistent with the Fifth Circuit's decision in *OHM Remediation Services*, which, in relevant part, affirmed a

district court's reasoning that dismissal of plaintiff's § 107(a) claim voided its derivative § 113(f) contribution action. *OHM Remediation Servs.*, 116 F.3d at 1580. In discussing the scope of § 113(f) contribution, the panel stated that "contribution" is to retain its customary usage within the context of CERCLA. *See id.* at 1582 ("We agree that 'contribution,' as that word is used in CERCLA, is best understood in its customary sense as a term of art referring to actions brought among potentially responsible parties."). The court relied on the Black's Law Dictionary definition of contribution:

> Right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear. Under principle of "contribution," a tort-feasor against whom a [judgment] is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.

Id. (quoting BLACK'S LAW DICTIONARY 328 (6th ed. 1990)). It held that "section 113(f) contribution actions may only be brought by persons who are liable or potentially liable under CERCLA." *Id.* The panel then addressed the timing of § 113(f)'s trigger, stating "[t]his interpretation of potential liability under section 113 allows parties to bring contribution actions at least as soon as they are sued under CERCLA." *Id.* at 1582 (footnote omitted). The court did not, however, reach the issue of pre-enforcement cleanup.

In its brief and at oral argument, Aviall cited *Centerior Service Co. v. ACME Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), and *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), to support its

position that it has a viable § 113(f)(1) contribution claim. *Centerior* and *Sun Co.* are inapposite, however, because in both cases, Environmental Protection Agency ("EPA") enforcement actions pursuant to § 106 preceded the contribution claims. *See Centerior*, 153 F.3d at 346; *Sun Co.*, 124 F.3d at 1189. Neither case focused on the viability of a pre-enforcement contribution claim. *Sun Co.* dealt with the proper statute of limitations to be applied to a CERCLA post-enforcement contribution claim and *Centerior* addressed whether joint and several cost recovery, or contribution alone, was available between PRPs.

Similarly, *Cooper Industries, Inc. v. Agway, Inc.*, 1996 WL 550128 (N.D.N.Y. Sept. 23, 1996), which Aviall cites, is also inapposite. *Cooper Industries* dealt *inter alia* with whether a PRP could assert a claim under § 107(a) against other PRPs. *Id.* at *4. On defendant's motion to dismiss for failure to state a cause of action, the court upheld the plaintiffs' claims based on a liberal reading of the complaint, which mentioned both § 107(a) and § 113(f). *Id.* at *5-*6. The EPA had issued a number of administrative orders on consent that directed the cleanup of the contaminated sites. *Id.* at *1. Therefore, cleanup in that case occurred within the procedural framework of CERCLA, and the court did not address whether pre-enforcement cleanup is covered by § 113(f).

The court holds that Aviall's contribution claim is analogous to those asserted in *Estes* and *Ameritrust Co.* Where, as here, a plaintiff in a CERCLA contribution action cannot allege any prior or pending CERCLA enforcement action against it, the plaintiff is precluded from seeking contribution pursuant to § 113(f)(1).[3] Therefore, the court

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[3] Because Aviall does not assert an independent claim for recovery under § 107(a), the court need not decide whether Aviall, as a PRP, is precluded from maintaining such a claim against Cooper.

grants Cooper's summary judgment motion as it pertains to Aviall's CERCLA § 113(f)(1) contribution claim and dismisses that claim without prejudice.[4]

III

A

Having dismissed Aviall's contribution claim, the court next addresses whether it must or should retain jurisdiction over the balance of the case.

The parties conceded at oral argument that they are not diverse citizens. This court's jurisdiction is thus derived from the now-dismissed CERCLA federal question claim. The federal Declaratory Judgment Act does not confer subject matter jurisdiction on this court. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Even if it did, the Act is "an authorization, not a command." *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962). Hence, federal district courts have broad discretion to grant or refuse declaratory relief. *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) (district court under no compulsion to exercise jurisdiction under the Declaratory Judgments Act); *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir. 1997); *Torch, Inc. v. LeBlanc*, 947 F.2d 193, 194 (5th Cir. 1991).[5] The court holds that the sole

[4] Although this is a disposition on the merits, which would normally result in dismissal *with* prejudice, the court is dismissing the claim *without* prejudice because Aviall arguably can bring such a claim against Cooper in the future if Aviall becomes subject to a CERCLA enforcement action that gives rise to a right of contribution.

[5] In its second amended complaint, Aviall includes in its declaratory judgment claim a reference to 42 U.S.C. § 9613. It is clear from this pleading, and from Aviall's responses at oral argument, however, that this claim is not an independent federal question declaratory judgment cause of action. CERCLA § 113(g)(2) provides for declaratory relief allocating liability in initial cost recovery actions under § 107 and, as the court has noted above, Aviall does not assert an independent § 107 claim.

federal question claim has dropped out of the case and that only state-law claims remain.[6]

B

The court recognizes that it may retain Aviall's state-law claims under the doctrine of supplemental jurisdiction, but it declines in its discretion to do so. *See* 28 U.S.C. § 1367(c)(3) (court may decline to exercise supplemental jurisdiction where it has dismissed all claims over which it has original jurisdiction). "[W]hen all federal claims are dismissed or otherwise eliminated from a case prior to trial, [the Fifth Circuit has] stated that [its] 'general rule' is to decline to exercise jurisdiction over the pendent state law claims." *McClelland v. Gronwaldt*, 155 F. 3d 507, 519 (5th Cir. 1998) (citing *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989)). In the present case, the court sees no reason to vary from the general rule.

First, as the court has noted, Aviall characterizes this lawsuit as "primarily, but not exclusively, a contract case." P. Apr. 16, 1999 Mem. at 1. Aviall also seeks relief under the Texas Solid Waste Disposal Act and the Texas Water Code, statutes that have, so far as relevant to this case, received scant attention from Texas courts, and about which this federal court would be venturing *Erie*-type guesses.[7] Aviall's state-law contract and statutory claims are thus best

[6] That Cooper counterclaims under § 113(f)(1) does not change this conclusion. Federal question jurisdiction is determined by examining Aviall's well-pleaded complaint.

[7] Such guesses would not, of course, be *Erie*-type in the archetypal sense because this court's jurisdiction is not based on diversity of citizenship.

addressed by, and the law developed in, state courts. Second, during oral argument, in response to specific questioning by the court, neither side even intimated that one or both parties would suffer prejudice by now litigating the remaining state-law claims in a Texas tribunal following dismissal of the federal lawsuit.

* * *

The court grants Cooper's motion for summary judgment to the extent of dismissing Aviail's § 113(f)(1) contribution claim without prejudice. The court dismisses Aviall's remaining causes of action, and Cooper's counterclaim, without prejudice.

SO ORDERED.

January 13, 2000.

/s/
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

MAR 17 2003

No. 02-1192

IN THE
SUPREME COURT OF THE UNITED STATES

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent.*

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves one issue. The question presented is whether a responsible party may bring an action for contribution under section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f), in the absence of a prior or pending federal "civil action" brought under sections 106 or 107 of CERCLA.

PARTIES TO THE PROCEEDING

A list of all of the parties to the proceeding in the Court whose judgment is the subject of this Brief in Opposition to Petition for a Writ of Certiorari is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Petitioner Cooper Industries, Inc. is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Respondent Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

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STATEMENT OF THE CASE

This case is a garden variety CERCLA action. A party who purchased contaminated property is seeking contribution from the seller for an equitable share of the cleanup costs. Actions such as this one have been routinely brought in the many years since CERCLA was first adopted. There is nothing new or unusual about this case except, perhaps, Cooper's legal arguments.

The relevant facts in this case are not in great dispute. Aviall purchased property from Cooper. Much of the contamination came from actions of Cooper; some came from actions of Aviall. Both parties are thus among the group of persons who are potentially liable under section 107(a) of CERCLA. In terms familiar under CERCLA, they are both "potentially responsible parties" or "PRPs." Aviall is now cleaning up the property and seeks, through an action under CERCLA, to obtain an equitable allocation of cleanup costs between the parties.

Although there is little factual dispute, Aviall would like to clarify two potentially misleading statements by Cooper. First, it is not accurate to state that Aviall undertook a "voluntary clean-up" of the property. Pet. at 2. Aviall is cleaning up the property in response to compulsion from and under the supervision of the State of Texas. The record reflects that the State directed Aviall to clean up the property under threat of issuing an order (R. 1444-49, 1454-55, 1462-64, 1496-97, 1505-06, 1522-23). Second, Cooper has not dropped its claim for cost-recovery under

section 107(a)(4)(B) of CERCLA. Pet. at 3. Rather, Aviall amended its complaint to assert a claim jointly under sections 107(a)(4)(B) and 113(f) (R. 136). Aviall's position was mandated by the holding of the Fifth Circuit in *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), which interpreted a PRP's cost recovery action under CERCLA as arising jointly through the operation of sections 107 and 113.

REASONS FOR DENYING THE PETITION

The decision of the en banc panel of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. As a case of first impression there can, of course, be no conflict. The decision of the court of appeals is, in fact, consistent with the holdings of every court of appeals since Congress amended CERCLA in 1986 to "clarify and confirm" a right of contribution. The lack of conflict, the consistent approach of the courts of appeals, and the settled state of the law demonstrate the lack of any compelling federal interest that would justify this Court addressing this issue. Accordingly, further review is not warranted.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THIS ISSUE

A. *Aviall* is Acknowledged to be a Case of First Impression and Thus There is No Conflict Among the Circuits.

As the en banc dissenting opinion stated and as acknowledged by Cooper, this case raises an issue of first impression in federal courts of appeals. *Aviall*

Services, Inc. v. Cooper Indus., Inc., 312 F.3d 677, 695 (5th Cir. 2002)(Garza, J., dissenting); Pet. at 4. It has been more than fifteen years since Congress amended CERCLA to provide an express right of contribution. Since that time, no court of appeals has directly addressed the question of whether an action for contribution may be brought in the absence of a prior or pending "civil action" under sections 106 or 107 of CERCLA. As a case of first impression, by definition, there can be no conflict among the courts of appeals on this issue.

That this issue has never been addressed by a court of appeals is itself instructive. Notwithstanding the enormous potential liability and the extensive litigation under CERCLA, it appears that no litigant has thought this issue worthy of pursuing on appeal. As Judge Jones aptly stated in the en banc opinion below, the absence of litigation on this issue is "like the dog that didn't bark." *Aviall*, 312 F.3d at 689. One need not be a Sherlock Holmes to see how this absence of litigation belies Cooper's claim of a compelling federal interest in addressing this issue.

B. The Practices of Every Other Court of Appeals Are Consistent With the En Banc Opinion in This Case

The absence of prior holdings by the courts of appeals does not mean that this issue is unsettled. On the contrary, the practices of these courts over the past fifteen years speak for themselves: courts of appeals have uniformly allowed actions for contribution to proceed in the absence of a prior or pending federal "civil action." *See, e.g., Crofton Ventures LP v. G&H*

Partnership, 258 F.3d 292 (4th Cir. 2001) (action for contribution following voluntary cleanup under supervision of state); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043 (6th Cir. 2000) (action for contribution following consent order with state); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000) (action for contribution following cleanup pursuant to a private contract); *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998) (action for contribution brought following consent order with state); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) (action for contribution following federal administrative order); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998) (action for contribution after state "required" cleanup); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) (action for contribution following voluntary cleanup); *Sun Co., Inc. v. Browning Ferris, Inc.*, 124 F.3d 1197 (10th Cir. 1997) (action for contribution following federal administrative order); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995) (action for contribution following cleanup under consent decree with state). Litigants have not raised the issue on appeal, and the courts of appeals have seen no need to raise it either. Thus, there is no conflict among the circuits in their conclusion that a claim for contribution may be brought in the absence of a federal "civil action."

Cooper tries to create a conflict by positing, not a conflict in holdings, but rather some conflict in "understandings" regarding the right of contribution. Pet. at 4, 26. Whatever Cooper may think a conflict of "understandings" means, the courts of appeals are

uniform in their understanding that an action for contribution by a PRP can proceed in the absence of a prior or pending federal civil action.[1]

C. The En Banc Opinion Below is Consistent With Settled Expectations Regarding the Scope of CERCLA.

As discussed above, since 1986 courts of appeals have routinely allowed PRPs to pursue actions for contribution in the absence of a prior or pending federal civil action. Although Congress has regularly

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[1] Cooper cites dictum in *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1187 (7th Cir. 1997), in which a panel of the Seventh Circuit stated that "a § 106 or a § 107 action *apparently* must be either ongoing or already completed before § 113(f)(1) is available. This *appears* to be what the statute requires..." (emphasis added). Although this may be how the statute *appeared* to the panel, the issue was simply not before the court at that time, and the reference was pure dictum. Indeed, a subsequent opinion by the Seventh Circuit upheld a right of contribution in the absence of a prior civil action under sections 106 or 107. *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). Thus, the Seventh Circuit, in a manner consistent with all other circuits, has allowed actions for contribution to be brought under CERCLA in the absence of a federal civil action.

Cooper also cites to dictum in *In re Hemingway Co.*, 993 F.2d 915, 931 (1st Cir. 1993), which Cooper characterizes as "seemingly contrary" to the en banc decision below. What Cooper does not cite is the subsequent statement by the First Circuit that it has taken "no view" on the availability of a right of contribution following a voluntary cleanup. *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994). This is hardly a basis for finding a conflict among the circuits.

amended the liability provisions of CERCLA, it has never revised this understanding of the right of contribution. *See, e.g.*, Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, Div. A, Title II, Subtitle E, 110 Stat. 3009-462 (1996) (amending sections 101 and 107); Small Business Liability Protection Act, Pub. L. No. 107-118, Title I, 115 Stat. 2356 (2002); Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, Title II, 115 Stat. 2356 (2002). In short, CERCLA, from its inception to the adoption of an express right of contribution and thereafter, has been interpreted to provide a federal cause of action for PRPs who clean up property in a manner consistent with CERCLA requirements. No party could reasonably have assumed that a right of contribution existed only if a party had been the subject of a federal civil action. Existing business practice and financial arrangements are presumably based on this settled understanding. No confusion or clamor creates a compelling federal interest in this Court addressing this issue.

II. THE COURT OF APPEALS WAS CORRECT

Cooper devotes most of its petition to a presentation of its interpretation of section 113(f) in CERCLA. Indeed, the petition essentially rehashes the arguments presented to the full panel of the Fifth Circuit. Fully briefed and argued below, all but three of the judges of the Fifth Circuit considered and rejected Cooper's position. Aviall relies on the carefully reasoned opinion of Judge Jones in response to Cooper's arguments.

Aviall would, however, emphasize certain difficulties with Cooper's argument. First, Cooper claims that, in the absence of prior or pending litigation, an action by a PRP is not consistent with a common law right of contribution. Pet. at 18-21. Notwithstanding Cooper's assertion, the courts of appeals have overwhelmingly characterized a CERCLA cost recovery action by one liable PRP against another as a "quintessential claim for contribution." *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998); *United States v. Colorado & E. R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 174 (7th Cir. 1994).

Second, Cooper claims that a right of contribution arises under section 113(f) only during or following a "civil action" under sections 106 or 107 of CERCLA. "Civil action" refers, of course, to a federal civil judicial proceeding.[2] If the right of contribution is limited by the first sentence of section 113(f) to an action brought during or following a "civil action," then parties who clean up contaminated property either (1) voluntarily, (2) following receipt of a federal

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[2] The Federal Rules of Civil Procedure expressly state: "There shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2. Sections 106 and 107 of CERCLA both provide for such civil actions in federal court. Under section 106, the government may seek an order in federal court to compel the cleanup of hazardous substances. Under section 107, parties may bring an action in federal court to recover certain cleanup costs. Additionally, section 106 provides an alternative administrative mechanism in addition to a civil action. The EPA, the federal agency with delegated authority, may issue administrative orders compelling the cleanup of hazardous substances.

administrative order, or (3) following some form of state order or compulsion, would have no right of contribution.

This cannot be what Congress intended. Despite the limited legislative history of section 113(f), one fact is clear: prior to 1986, courts had allowed PRPs to pursue cost recovery actions against one another in the absence of federal litigation. Congress adopted section 113(f) simply to "clarify and confirm" an express right of contribution that had previously been found by many federal courts. Nothing in the legislative history indicates that Congress intended to restrict the availability of a federal cause of action by PRPs.

But Cooper's construction would do just that. In fact, it would eliminate any federal cause of action under CERCLA by PRPs who clean up property voluntarily, under state compulsion, or following a federal administrative order.[3] Under Cooper's logic, these PRPs lost the right of cost recovery as a result of Congress' intent to "clarify and confirm" their right to

[3] This conclusion arises because most courts of appeals have held that PRPs are limited to an action for contribution under section 113(f). *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 11 F.3d 116, 120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E .R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). If, as Cooper asserts, PRPs who voluntarily clean up property or who clean up property following a federal or state administrative order or under state compulsion have no right of contribution, then they would have no right of cost recovery under CERCLA at all.

contribution. Nothing in the legislative history indicates that Congress intended such a fundamental change in CERCLA.

III. This Case Raises No Other Issues That Warrant Review By This Court

In an attempt to bolster its argument for review by this Court, Cooper suggests that this case implicates several other issues under CERCLA. Cooper claims that this case somehow involves the issue of federal preemption of state claims for contribution. Pet. at 28. Cooper also implies that this case somehow involves an interpretation of the statute of limitations in section 113(g) of CERCLA. These claims can most charitably be described as "red herrings."

There is only one issue raised by this case: whether a PRP may bring an action for contribution in the absence of a prior or pending "civil action." There are, of course, numerous issues that may arise under CERCLA. Such issues include the relationship between sections 113(f) and 107(a)(4)(B), the scope of preemption of state cost recovery claims, and the application of CERCLA's statutes of limitations. These issues, however, were neither raised, briefed, nor decided in this case. Should this Court wish to address or clarify any of these matters, this case is simply not the appropriate vehicle.

CONCLUSION

The en banc opinion of the Fifth Circuit below properly interprets the meaning of section 113(f) of CERCLA. As a case of first impression, there is no

conflict among the circuits on this issue; indeed the federal courts of appeals are consistent in allowing actions for contribution in the absence of a prior or pending federal "civil action." There is no pressing federal interest justifying further review of this case, and thus, the petition should be denied.

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Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

(3)

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO THE OPPOSITION TO THE PETITION

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REPLY TO THE OPPOSITION TO THE PETITION

Petitioner Cooper Industries, Inc. ("Cooper") respectfully submits this reply to the Brief in Opposition to Petition for a Writ of Certiorari ("Opp.") filed by Aviall Services, Inc. ("Aviall").

Aviall's Opposition oversimplifies the controversy and confusion surrounding the interpretation of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and understates the significance of the issue in dispute. The proper interpretation of CERCLA Section 113(f)(1)'s operative language has admittedly divided the *en banc* Fifth Circuit Court of Appeals, in addition to many judges on the other trial and appellate courts. *See* Petition for a Writ of Certiorari ("Pet.") 27. In addition, the opinion below completely disregarded the requested views of the federal government and dramatically altered the common law of contribution. The continuing divergent views among the

courts on this key aspect of CERCLA enforcement require guidance from this Court.

Aviall's oversimplification mainly consists of ignoring the important distinction between Section 107(a)(4)(B), 42 U.S.C. § 107(a)(4)(B), direct cost recovery claims and derivative claims for contribution under Section 113(f)(1). Instead of recognizing that two divergent lines of precedent create discrete rules applicable to each of these distinct claims, Aviall discusses these cases interchangeably. After reading the detailed discussion of these two lines of authority in Cooper's petition (Pet. 15-17 nn. 11-12), Aviall should know better.[1] The following discussion untangles Aviall's muddled analysis and ensures that the core issue for review has not been improperly obscured.

1. Aviall seeks contribution, not cost recovery.

Aviall only seeks contribution under Section 113(f)(1), not direct cost recovery under Section 107(a)(4)(B). In fact, Aviall voluntarily dropped the Section 107 claim from its original complaint.[2] App. 93a-94a. Thus,

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[1] The Fifth Circuit *en banc* majority made the same mistake, suggesting that *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) was the "seminal decision" regarding "contribution" rights under CERCLA. App. 15a. To the contrary, "contribution" is not addressed (or even mentioned) anywhere in the *Stepan Chemical* decision or any of the other cases cited by the Fifth Circuit as supposedly being "in the nature of contribution." App. 16a, nn 6-7.

[2] Presumably Aviall dropped this claim because it knew that cost recovery under Section 107(a)(4)(B) was unavailable. Overwhelming precedent confirms that persons who, like Aviall, have contributed to contamination cannot pursue cost recovery claims under Section 107(a)(4)(B) of CERCLA. *See* Pet. 25 n. 22 and cases cited.

the cost recovery precedent relied on by Aviall (Opp. 8) is irrelevant and unhelpful. Cooper agrees that a party seeking Section 107(a)(4)(B) *cost recovery* for contamination caused solely by others can recover without first being subjected to clean-up liability. *See* Pet. 25 n. 22 and cases cited. However, that is not the issue in this case. Rather, Cooper asks this Court to determine whether persons seeking *contribution* under Section 113(f)(1) must first be subject to a civil action under CERCLA Section 106, 42 U.S.C. § 9606, or Section 107. *See* Pet. 2.

As the Fifth Circuit found (App. 10a), Aviall's cleanup was not in response to any federal or state enforcement action under Section 106 or 107 of CERCLA. Further, Aviall has never been subject to any private CERCLA claim – whether by Cooper or by any other party.[3] Thus, to characterize this case as "a garden variety CERCLA action" for contribution (Opp. 1) is misleading. Indeed, prior to enactment of Section 113(f)(1), CERCLA contribution claims were recognized only as implied rights of action in cost recovery suits under Section 107(a)(4)(B), where those subject to liability for clean-up costs in a Section 107 enforcement action sought to implead other potentially responsible parties to share those clean-up costs. *See* Pet. 6-7. As the legislative history of Section 113(f)(1) makes clear, this was the "garden variety CERCLA action" that Congress added to the statute as an express right of contribution -- tied by the "during or following" language (as the implied right of action had been) to a Section 106 or 107 "civil action." Pet. 15-17.

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[3] Aviall's allegation that "Cooper has not dropped its claim for cost-recovery under section 107(a)(4)(B)" of CERCLA (Opp. 1-2) is simply false. Cooper *never filed any such claim* in this case.

By reading Section 113(f)(1)'s savings clause as overriding its enabling language, Aviall attempts to argue that Cooper's interpretation departs from the common law of contribution. Opp. 7. To the contrary, it is the undue weight placed by the Fifth Circuit on the provision's savings clause that effectuates a change from the common law. As confirmed by a more careful reading of the very cases Aviall cites (Opp. 4), at common law only those held liable for costs incurred had a right of contribution against other responsible persons. *See* Pet. 18-21; *see also* RESTATEMENT (SECOND) OF TORTS § 886a, cmt. e (1979) (before there can be contribution there must be joint tortfeasors). Congress has opened the door no farther. *See* Pet. 14-17.

Aviall's argument that enforcing Section 113(f)(1)'s explicit "during or following" requirement would eliminate contribution rights long available to responsible parties who voluntarily cleaned up their property (Opp. 8-9, 9 n. 3) is disingenuous. In fact, contribution rights have *never* been available to parties who did not contribute to the contamination and incur liability. *See* RESTATEMENT (SECOND) OF TORTS § 886a, cmt. e (no contribution in favor of a volunteer); *see also* Pet. 20-21. Section 113(f)(1) maintains this *status quo*, explicitly providing no more under the enabling clause, and preserving no less under the savings clause.

In contrast, the Fifth Circuit's far more expansive interpretation opens a right of contribution to virtually all litigants – a result finding no support in the historic underpinnings of common law contribution. Equally disturbing, the Fifth Circuit's reliance on Section 113(f)(1)'s savings clause to override its enabling clause defies every known principle of statutory construction. *See* Pet. 12-14. Notably, Aviall offers no argument whatsoever justifying such a result.

2. This Court's guidance is required to resolve the pervasive disagreement on this important issue of statutory interpretation.

Contrary to Aviall's assertion (Opp. 5), the federal circuits are far from "uniform" in their interpretation of Section 113(f)(1). As more fully discussed in the Petition (*see* Pet. 26), the Fifth Circuit's holding -- that Section 113(f)(1) allows contribution suits in the absence of a pending or concluded enforcement action -- directly conflicts with the Seventh Circuit's analysis in *Rumpke v. Cummins Engine Co.*, 107 F. 3d 1235 (7th Cir. 1997), which concluded that a Section 106 or Section 107 civil action must "either be ongoing or already completed before § 113(f)(1) is available." *Id.* at 1241.

The First Circuit supports the Seventh Circuit's conclusion. In *In re Hemingway Transport Inc.*, 993 F.2d 915, 931 (1st Cir. 1993), the First Circuit reads Section 113(f)(1)'s savings clause as preserving a right of contribution for one who had incurred clean-up costs in response to a Section 106 EPA order. In contrast, under similar circumstances, both the Sixth and Tenth Circuits displayed seeming indifference to Section 113(f)(1)'s "during or following" limitation by allowing contribution actions to proceed. *Compare Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), and *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997).

The federal district courts are no more "uniform" in their view of when Section 113(f)(1) permits the filing of a CERCLA contribution action. As set forth in the Petition, a number of lower courts have found that a pending or concluded Section 106 or 107 enforcement action is unnecessary to seek CERCLA contribution. *See* Pet. 27 and

cited cases. In direct contradiction, other district courts have held that Section 113(f)(1)'s "during or following" clause explicitly limits CERCLA contribution rights. *See id.* and cases cited. This divergence signifies a deep and irreconcilable division that only this Court can resolve.[4]

Further, a grant of certiorari here is particularly important due to the breadth of Section 113(f)(1)'s impact. Interpretation of Section 113(f)(1) raises several other significant concerns, including its effect on the appropriate statute of limitations for contribution actions and the extent of federal preemption. *See* Pet. 21-25. These issues turn directly on whether the key facets of Section 113(f)(1) are read literally (as by the Seventh and First Circuits) or expansively (as by the *en banc* court below). Aviall mischaracterizes these considerations as "red herrings." Opp. 10. To the contrary, such concerns have a direct bearing on the present statutory question and underscore the need for this Court to resolve this issue and thereby avoid further widespread confusion.

Accordingly, Cooper urges that the writ be granted, and that the issue as to the proper interpretation of CERCLA Section 113(f)(1) be heard by the Court. The Fifth Circuit, ignoring the views of the United States, wrongly decided that Congress devised a "free standing" right of contribution, divorced from any underlying liability determination. This conclusion contradicts the common law. It does not comport

[4] Aviall suggests that the issue is not of sufficient moment for this Court to address because few of the district court cases have found their way to the courts of appeals. Opp. 3. The fact that a case does not advance to the appellate courts, for whatever reason, in no way detracts from the importance of the issue or minimizes the depth of controversy. Here especially, such an observation cannot hide the presence of a festering issue of statutory construction that divides the federal courts and causes confusion with respect to CERCLA enforcement.

with the language or history of the statutory provision in question. It flies in the face of the construction of Section 113(f)(1) that the government, as the statute's principal enforcer, has assigned to the provision. And, it directly conflicts with the decisions of other federal circuits and district courts. Plenary review is, therefore, needed.

CONCLUSION

For the reasons stated here and in its Petition for Certiorari, Cooper requests that this Court grant the writ and hear this case.

Respectfully submitted.

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MARCH 2003

Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

(4)

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a party that is potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, for cleanup of property contaminated by hazardous substances, but has not been sued under CERCLA to undertake or to pay for the cost of the cleanup, may nevertheless seek contribution under CERCLA from other jointly responsible parties.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. The petition for a writ of certiorari presents the question whether a party that is potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, for cleanup of property contaminated by hazardous substances may seek contribution from other jointly responsible parties in the absence of a CERCLA suit that would determine and discharge the underlying liability. The United States submits that the court of appeals' divided en banc decision, which holds that a contribution action is available in that situation, is mistaken and that this Court should grant the petition to resolve that important and unsettled issue.

STATEMENT

Aviall Services, Inc., sued Cooper Industries, Inc., in the United States District Court for the Northern District of

Texas to recover expenses that Aviall has incurred in cleaning up property Aviall purchased from Cooper. During their respective ownerships, Cooper and Aviall each disposed of hazardous substances at the site. Aviall asserted that Section 107 of CERCLA, 42 U.S.C. 9607, subjects Aviall and Cooper to joint and several liability for the cleanup, and it claimed that Section 113(f)(1) of CERCLA, 42 U.S.C. 9613(f)(1), therefore renders Cooper liable to Aviall for contribution. The district court dismissed that claim without prejudice, ruling that, unless and until Aviall is itself subject to suit under CERCLA, it cannot seek contribution from other potentially liable parties. Pet. App. 90a-100a. A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed that judgment. *Id.* at 47a-89a. The en banc court of appeals, in a divided decision, vacated the panel's judgment and reversed. *Id.* at 9a-45a.

A. The CERCLA Liability Scheme

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous-waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 15 (1985) ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

CERCLA provides the President (acting primarily through the Environmental Protection Agency (EPA), see Exec. Order No. 12,580, 3 C.F.R. 193 (1987)), with alternative means for cleaning up contaminated property. Section 104 of CERCLA authorizes EPA itself to undertake response actions designed to remove hazardous substances and provide appropriate remediation, using the Hazardous Substance Superfund. See 42 U.S.C. 9604; see also *Bestfoods*, 524 U.S. at 55. Alternatively, Section 106(a) authorizes EPA to compel, by means of an administrative order or a request for judicial relief, the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a). Under either approach, the United States may recover its response costs from responsible parties through a cost recovery action under Section 107(a). See 42 U.S.C. 9607(a).

Section 107(a) authorizes the United States, as well as other entities, to seek recovery of cleanup costs from four categories of "covered persons"—sometimes referred to as "potentially responsible parties" or "PRPs"—associated with the release or threatened release of hazardous substances. 42 U.S.C. 9607(a). Those entities are: (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time hazardous substances were disposed; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances to the site. 42 U.S.C. 9607(a)(1)-(4). Congress has broadly defined the pertinent statutory terms—including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal"—to reach a wide range of entities and activities. See CERCLA § 101(9), (14), (20)-(22), (26) and (29), 42 U.S.C. 9601(9), (14), (20)-(22), (26) and (29).

Section 107(a) of CERCLA specifically provides that the United States, individual States, and Indian tribes are entitled to recover from covered persons "all costs of removal or

remedial action incurred" that are "not inconsistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. 9607(a)(1)-(4)(A). The national contingency plan consists of federal regulations that prescribe the procedure for conducting hazardous substance cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300; see also CERCLA § 101(23), (24) and (31), 42 U.S.C. 9601(23), (24) and (31); Clean Water Act of 1977 (CWA) § 311(c) and (d), 33 U.S.C. 1321(c) and (d).

CERCLA also authorizes entities other than the United States, individual States, and Indian tribes to recover their costs of cleaning up contaminated property under certain circumstances. For example, a party that complies with a government order under Section 106(a) to respond to an actual or threatened release of hazardous substances may petition the government for reimbursement of its expenses on the ground that it is not liable for the response costs or that the government's decision in selecting a response action was arbitrary and capricious or otherwise not in accordance with law. See CERCLA § 106(b), 42 U.S.C. 9606(b). If the government denies the petition, the party may file a judicial action seeking reimbursement. See CERCLA § 106(b)(2)(B), 42 U.S.C. 9606(b)(2)(B).

In addition, Section 107 of CERCLA provides that persons "other" than the United States, an individual State, or an Indian tribe may recover "any other necessary costs of response" that are incurred "consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B). The courts of appeals have ruled that persons who are not themselves liable may clean up contaminated property and then invoke this provision to seek reimbursement from the same four categories of potentially liable parties that are subject to government cleanup actions.[1] The

[1] See *In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241-1242 (7th Cir. 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

courts of appeals have uniformly concluded, however, that a person who falls within one of those four categories cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f).[2]

Section 113(f), which Congress added as part of the 1986 SARA amendments, explicitly addresses when a potentially liable party may seek contribution. See 42 U.S.C. 9613(f). Section 113(f)(1) provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]. * * * Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106] or [Section 107].

42 U.S.C. 9613(f)(1). Section 113(f)(2) additionally states that a party that resolves its liability to the United States or a State through an administrative or judicially approved settlement shall not be subject to contribution "regarding mat-

[2] See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Redwing Carriers, Inc.*, 94 F.3d at 1496; *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp.*, 33 F.3d at 103; *Akzo Coatings, Inc.*, 30 F.3d at 764.

ters addressed in the settlement." 42 U.S.C. 9613(f)(2). Section 113(f)(3)(B) further provides:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. 9613(f)(3)(B). See CERCLA § 122, 42 U.S.C. 9622 (governing CERCLA settlements).[3]

The central issue in this case is whether Section 113(f) authorizes a party that is potentially subject to CERCLA liability, but has not been sued under Section 106 or 107(a) of CERCLA and has not resolved its CERCLA liability through an administrative or judicially approved settlement, to seek contribution under CERCLA from another jointly liable party.

B. The Facts And Proceedings Below

Aviall provides aircraft maintenance services. In 1981, it purchased Cooper's aircraft engine maintenance business through an asset purchase agreement. Aviall later discovered hazardous substance contamination, allegedly arising from the activities of both Aviall and Cooper, at Texas facilities acquired from Cooper. Aviall notified Texas environmental authorities of the contamination. Those authorities confirmed that Aviall was in violation of state environmental laws and directed the company to take corrective actions. In 1984, Aviall commenced cleanup activities, and, in 1995, it contacted Cooper seeking reimbursement for the response costs. Aviall later sold the facilities, but remained contractually responsible for the cleanup. Pet. App. 10a, 48a, 91a.

[3] Section 122(a) authorizes the President (or his delegate) to enter into an agreement with persons (including responsible parties) to perform response actions if the President determines such action will be done properly by such person. 42 U.S.C. 9622(a). Section 122(d) provides that such agreements, other than "de minimis settlements" under Section 122(g), shall generally be entered in the appropriate United States district court as a consent decree. 42 U.S.C. 9622(d); see 42 U.S.C. 9622(g). Section 122(g) "de minimis settlements," 42 U.S.C. 9622(g), and Section 122(h) settlements, reached by the head of any department or agency with authority to undertake response action, 42 U.S.C. 9622(h), may be embodied in an administrative order. See CERCLA § 122(i), 42 U.S.C. 9622(i).

Aviall commenced this action against Cooper in federal district court to obtain recovery of its cleanup expenditures. Aviall's complaint alleged that Cooper had breached its contractual and warranty obligations under the asset purchase agreement. Pet. App. 91a-92a. In addition, although neither the United States nor Texas had sued Aviall to compel cleanup or to recover response costs, Aviall asserted that Cooper was liable to Aviall for contribution under Section 113(f) of CERCLA and Texas law. *Ibid.* The CERCLA contribution claim provided the sole basis for federal jurisdiction. *Id.* at 98a-99a.

The district court rejected Aviall's CERCLA contribution claim. The court concluded that "[t]he plain language of § 113(f)(1) provides that contribution claims may only be brought '*during* or *following* any civil action under [§ 106] or under [§ 107(a)].' (emphasis added)." Pet. App. 94a. The court additionally concluded that the last sentence of Section 113(f)(1) is merely a savings clause that preserves independent contribution remedies so that "parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law." *Ibid.* The district court accordingly dismissed Aviall's CERCLA contribution claim, but without prejudice in the event that a Section 106 or 107 action were brought against Aviall in the future. *Id.* at 97a-98a & n.4. The court declined to retain federal jurisdiction over the remaining state law claims. *Id.* at 99a-100a.

A divided panel of the court of appeals affirmed. Pet. App. 47a-89a. The majority concluded that, "as a matter of

statutory text and structure, CERCLA requires a party seeking contribution to be, or have been, a defendant in a § 106 or § 107(a) action." *Id.* at 57a; see *id.* at 52a-56a. The majority, like the district court, construed the final sentence of Section 113(f)(1) as merely a "savings clause" that preserved independent bases for contribution, such as Aviall's contribution claims against Cooper under Texas law. *Id.* at 56a. The majority also stated that the legislative history of CERCLA, prior CERCLA decisions, and the policy goals of CERCLA all supported its construction of the statutory text. *Id.* at 57a-66a. Judge Wiener dissented, reasoning that the first sentence of Section 113(f)(1) does not categorically require that a party seek contribution in response to a Section 106 or 107(a) action and that the final sentence of Section 113(f) explicitly authorizes a party to seek contribution in the absence of such suits. *Id.* at 66a-78a. Judge Wiener also stated that the legislative history, case law, and policy arguments supported his construction. *Id.* at 78a-89a.

The court of appeals granted Aviall's petition for rehearing en banc "[b]ecause of the importance of this question to the allocation of financial responsibility for CERCLA cleanups." Pet. App. 12a, 46a. The en banc court, by a divided vote, reversed the judgment of the district court. *Id.* at 9a-45a. The majority adopted the reasoning of Judge Weiner and concluded:

> [S]ection 113(f)(1) does not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only "during or following" litigation commenced under sections 106 or 107(a) of CERCLA. Instead, a PRP may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site. Section 113(f)(1) authorizes suits against PRPs in both its first and last sentence which states without qualification that "nothing" in the section shall "diminish" any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action.

Pet. App. 13a-14a. Judge Emilio Garza, joined by Judges Smith and Barksdale, dissented, concluding that "the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action." *Id.* at 41a-42a.

DISCUSSION

The en banc court of appeals has misconstrued CERCLA's contribution provisions. By its plain language, Section 113(f)(1) provides a party that is jointly liable for response costs under CERCLA with a right to contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve that liability. Section 113(f)(1)'s savings clause does not negate that express limitation, but instead preserves any additional rights to contribution that a party may have under other laws. The en banc court's erroneous decision conflicts with the plain language of the statute and endorses an interpretation of CERCLA that has broad repercussions on the allocation of financial responsibility for CERCLA cleanups. Because the issue is important and recurring, and the court of appeals' decision endorses an unauthorized invocation of federal court jurisdiction, this Court should grant the petition for a writ of certiorari.

A. The Court Of Appeals Erred In Construing CERCLA's Contribution Provisions

CERCLA subjects parties that have contributed to the release or threatened release of hazardous substances to liability for the resulting response costs. CERCLA §§ 106, 107(a), 42 U.S.C. 9606, 9607(a). CERCLA, which operates against a "venerable common law backdrop," *Bestfoods*, 524 U.S. at 62, subjects a responsible party to joint and several

liability in accordance with common law principles if the harm from the release of hazardous substances is not divisible, and it provides a corresponding statutory right of contribution from other jointly liable parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *Key Tronic Corp.*, 511 U.S. at 816.[4]

Section 113(f)(1) of CERCLA explicitly identifies the circumstances in which a jointly liable party may seek contribution:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], *during or following any civil action under [Section 106] or under [Section 107(a)]*.

42 U.S.C. 9613(f)(1) (emphasis added). Consistent with the traditional understanding of contribution principles, that provision allows a jointly responsible party to seek contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve the joint liability it seeks to apportion among other responsible parties. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981) ("Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors *has paid* more than his fair share of the common liability." (emphasis added)).[5]

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[4] See, *e.g.*, *Centerior Serv. Co.*, 153 F.3d at 348; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 721-722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-269 (3d Cir. 1993); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

[5] See also, *e.g.*, *United Techs. Corp.*, 33 F.3d at 99 ("Contribution is a standard legal term that enjoys a stable, well-known denotation. It refers to a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them *has been compelled to make*.' ") (emphasis added) (quoting *Akzo Coatings, Inc.*, 30 F.3d at 764); Restatement (Third) of Torts § 23 comment b (1999) ("A person seeking contribution *must extinguish the liability* of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment.") (emphasis added); Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 123 (1955) (accord); *Black's Law Dictionary* 328 (6th ed. 1990) (defining contribution as a right "of one *who has discharged a common liability* to recover of another, also liable, the aliquot portion which he ought to pay or bear") (emphasis added).

The court of appeals concluded (Pet. App. 24a-25a) that the first sentence of Section 113(f)(1) allows contribution actions in the absence of an ongoing or completed Section 106 or 107(a) action on the mistaken ground that if Congress had not intended to authorize such actions it would have provided that contribution actions shall "only" be brought during or following a Section 106 or Section 107(a) action. Pet. App. 24a-25a. Congress's intentions, however, are clear from the plain language of the statutory text. Section 113(f)(1)'s permissive phrasing—a "person *may* seek contribution"—indicates that Congress intended to permit contribution claims to be brought when the stated prerequisites—namely, that contribution be sought "during or following" a Section 106 or Section 107(a) action—are satisfied. It does *not* provide authorization for contribution claims where those prerequisites are *not* satisfied. The court of appeals' contrary interpretation renders the "during or following" requirement entirely superfluous, in violation of basic canons of statutory construction. See, *e.g.*, *Dole Food Co.* v. *Patrickson*, 123 S. Ct. 1655 (2003); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).[6]

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[6] Contrary to the court of appeals' suggestions, Section 113(f)(1)'s syntax is not "confused" and its grammar is not "inexact." Pet. App. 13a. Rather, Section 113(f)(1) speaks unambiguously through the familiar syntax and grammar that is routinely employed in granting a permissive, but limited, license. For example, a sign stating that "Visitors May Enter

The court of appeals also mistakenly relied (Pet. App. 25a-27a) on the last sentence of Section 113(f)(1), which provides that "[n]othing in this subsection shall *diminish the right* of any person to bring an action for contribution in the absence of civil action under [Section 106] or [Section 107]." 42 U.S.C. 9613(f)(1) (emphasis added). The court erroneously construed that sentence, which is clearly written in the form of a "savings" clause, as affirmatively creating a right to contribution. The specific terms of the savings provision, however, merely preserve any *independent* right to contribution that exists apart from Section 113(f)(1), such as the state law right to contribution that Aviall invoked in this very case (Pet. App. 91a). See *United States* v. *Locke*, 529 U.S. 89, 105 (2000).[7]

Through The Front Door During Normal Business Hours" informs the visitor that, if he wants to enter through the front door, he must do so during the prescribed period. It does not grant the visitor the right to use the front door at any time he wishes. See Pet. App. 34a-35a (Garza, J., dissenting).

[7] The court of appeals suggested that Congress added the last sentence of Section 113(f)(1) to indicate that the federal courts "had been right," in CERCLA cases decided before Congress added Section 113(f)(1) through the 1986 SARA amendments, in engrafting an implied federal common law right of contribution onto CERCLA. Pet. App. 26a. The court's reasoning, however, rests on a mistaken understanding of the pre-SARA caselaw and, in any event, is unpersuasive. As the First Circuit explained in *United Technologies*, the pre-SARA courts were divided on the question whether there was an implied right to contribution under CERCLA. 33 F.3d at 100. Those lower courts that did recognize such a right employed the term "contribution" in its "traditional legal sense." *Id.* at 100-101. As the First Circuit also explained, the term contribution is traditionally understood to denote "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them *has been compelled to make*.'" *Id.* at 99. See note 5 , *supra*. Congress expressly provided for contribution under those circumstances through the first sentence of Section 113(f)(1) by allowing contribution "during or following" a Section 106 or 107(a) action. If Congress had intended to create an even broader form of contribution, it would have written the first sentence of Section 113(f)(1) to accomplish that result. It would not have perpetuated the pre-SARA uncertainty by depending on courts to fashion a novel form of contribution, foreign to traditional legal understanding, through Section 113(f)(1)'s savings clause. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

In addition to misconstruing Section 113(f)(1), the court of appeals overlooked the significance of Section 113(g)(3), which addresses the limitations periods for contribution actions. See 42 U.S.C. 9613(g)(3). As previously explained (pp. 5-6, *supra*), Section 113(f)(1) expressly allows contribution "during or following" a Section 106 or 107(a) civil action, while Section 113(f)(3)(B) expressly allows contribution after an administrative or judicially approved settlement. See 42 U.S.C. 9613(f)(1) and (3)(B). Section 113(g)(3) provides two corresponding limitations periods:

> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or
>
> (B) the date of an administrative order under [Section 122(g)] (relating to de minimis settlements) or [Section 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. 9613(g)(3). Section 113(g)(3)(A) thus establishes a three-year limitations period for contribution actions brought "during or following" a Section 106 or 107(a) action, while Section 113(g)(3)(B) designates a three-year limitations period for contribution actions brought after the party has resolved its liability through an administrative or judicially approved settlement. But Section 113(g)(3) does *not* provide a limitations period for contribution actions in the absence of a Section 106 or 107(a) action or a settlement,

which indicates that Congress did not intend to create a federal right to contribution in that situation.

The plain language of Section 113(f)(1), particularly when read in light of Section 113(g)(3), conclusively establishes that a party may not seek contribution under CERCLA in the absence of a Section 106 or 107(a) action. There accordingly is no need to resort to legislative history to answer that question. But in any event, the legislative history includes committee reports and statements in the floor debates indicating that contribution is not available in the circumstances presented here. The pertinent Senate and House bills that ultimately became SARA contained differently worded contribution provisions. But each chamber indicated that the object was to provide for contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement.[8]

[8] The Senate bill initially provided that a contribution action may be brought "[a]fter judgment in any civil action under section 106 or under [Section 107(a)]." See S. Rep. No. 11, 99th Cong., 1st Sess. 103 (1985) (proposed Section 107(*l*)(2)). The Senate report stated that "[t]his amendment clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 44 (emphasis added). The Senate later revised its proposed language through a floor amendment to allow contribution "during or following" a Section 106 or 107(a) action so that contribution claims could be resolved in one suit. See 131 Cong. Rec. 24,449 (1985). The sponsors explained that the floor amendment would allow "any defendant in a Government enforcement action under CERCLA * * * to file a claim for contribution against others * * * *as soon as the enforcement action has been brought.*" *Id.* at 24,450 (Sen. Stafford) (emphasis added); see also *id.* at 24,452 (Sen. Thurmond); *id.* at 24,453 (Sen. DeConcini). The House bill initially provided that "any defendant alleged or held to be liable in an action under section 106 or section 107" may bring a contribution action. See H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 13 (1985) (proposed Section 113(g)(1)). Like the Senate report, the House report stated that the proposed language "clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 79 (emphasis added). The House Judiciary Committee later made minor "technical" changes to the House bill that "simply clarif[y] and emphasize[] that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. Rep. 253, *supra*, Pt. 3, at 18. The House-Senate conference, which produced the final language, adopted without further pertinent elaboration the Senate's "during or following" formulation and the House provisions allowing contribution following settlement. See H.R. Rep. No. 962, 99th Cong., 2d Sess. 37, 222 (1986).

Similarly, the court of appeals' reliance on "policy considerations" (Pet. App. 31a) is misplaced. Congress expressed the controlling policy through Section 113(f)(1)'s text, which adopts the traditional practice of allowing a party to seek contribution only if that party is itself subject to suit. The judiciary's task is "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 126 (1989). The congressional judgment set forth in the statutory text accordingly should control. See, *e.g.*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). See also Pet. App. 44a-45a (Garza, J., dissenting).[9]

[9] CERCLA seeks to encourage voluntary private party cleanups, but there is no evidence in the record of this case to support the court of appeals' assumption (Pet. App. 31a) that the availability of a contribution action in the absence of a Section 106 or 107(a) suit is critical in encouraging such cleanups. Even if the court's assumption were correct, contribution under those circumstances poses a heightened risk that the contributing party may be subject to double liability. Under CERCLA, a responsible party's voluntary cleanup does not discharge the underlying liability to the government except as provided in a settlement or federal court judgment to which the government is a party. 42 U.S.C. 9613(f)(2). Hence, a party that is ordered to pay "contribution" in the absence of such a resolution has no guarantee that its payment will discharge its liability and remains potentially subject to a future government cost recovery action if any relevant government agency later investigates and determines that the voluntary conduct is inadequate or improper. See Restatement (Third) of Torts § 23 (1999), Reporter's Note, cmt. b ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought. See Uniform Contribution Among Tortfeasors Act § 1(d). Otherwise, the person against whom contribution is sought would be subject to double liability.").

B. This Court Should Grant The Petition For A Writ Of Certiorari

The court of appeals granted en banc review on the issue in this case "[b]ecause of the importance of this question to allocation of financial responsibility for CERCLA cleanups." Pet. App. 12a. The issue here is indeed important, and the en banc court's erroneous resolution augments its significance. The court of appeals' decision allows the unauthorized invocation of federal court jurisdiction, endorses a mistaken view of the CERCLA liability scheme, and condones the unauthorized imposition of financial liability under federal law. The en banc Fifth Circuit is the first court to address the issue squarely in a concrete context, but its decision is inconsistent with the statutory restrictions respecting contribution under the CERCLA liability scheme. There is little to be gained in allowing a new federal cause of action to continue in existence before correcting the court's erroneous interpretation.

As explained above, ten courts of appeals have uniformly ruled that Section 107(a)(1)-(4)(B) of CERCLA allows a "person" that falls within one of CERCLA's four categories of liable parties to obtain a recovery from another jointly liable party only through a contribution action under Section 113(f). See 42 U.S.C. 9607(a)(1)-(4)(B); pp. 4-5 & note 2, *supra*. That result avoids the anomaly of a jointly liable party suing another jointly liable party for the full costs of a CERCLA cleanup. It also ensures that parties that have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2), are not subject to double liability through a Section 107(a) suit on the theory that such a suit imposes direct liability rather than contribution.[10]

[10] The United States endorsed the uniform conclusion of the courts of appeals on this issue in its response to an order of this Court inviting the United States' views on a petition for writ of certiorari filed in *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (No. 97-795). In that case, the court of appeals ruled that a private party that was concededly liable for the costs of responding to hazards at a mine site under CERCLA could not recover its cleanup costs by bringing an action against other responsible parties seeking to hold them jointly and severally liable for those expenses. The United States urged the Court to deny certiorari on the ground that the courts of appeals were in agreement that a potentially responsible party must sue for contribution under Section 113(f), stating:

> Section 107(a)(4)(B) of CERCLA provides that a responsible private party shall be liable for "necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). Section 107(a)(4)(B)'s reference to "any other person" is broad enough to allow one jointly responsible party to sue another for the former's response costs. See *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 (1994) (Section 107 "impliedly authorizes private parties to recover cleanup costs from other PRPs."). Section 107(a)(4)(B) does not describe, however, what form that liability should take. *Key Tronic*, 511 U.S. at 818 & n.11. Section 113 fills that void. When read in combination, the clear implication of Sections 107(a)(4)(B) and 113 is that the jointly responsible party is limited to seeking contribution in accordance with Section 113(f).

Brief for the U.S. as Amicus Curiae at 10, *Pinal Creek Group*, *supra* (No. 97-795). Since the early stages of this litigation, Aviall has predicated its contribution claim on that understanding of the relationship between Section 107(a) and Section 113(f). See Pet. App. 94a ("Aviall has dropped the independent § 107(a) claim and instead asserts a so-called 'combined' § 107(a) and § 113(f)(1) claim.").

As a practical matter, the uniform view of the courts of appeals that a responsible party can seek reimbursement for response costs under CERCLA only through a contribution action, when coupled with the understanding that a responsible party may seek contribution under CERCLA only "during or following" a Section 106 or 107(a) action or after settlement, imposes a coherent structure on the allocation of CERCLA response costs and a sensible limitation on CERCLA contribution suits. That construction ensures that CERCLA does not create a free-ranging federal cause of action under which responsible parties may sue each other at

any time for damages they jointly caused. Rather, a responsible party that satisfies its CERCLA liability to the government, through settlement or judgment, may obtain contribution from other responsible parties within a statutorily prescribed limitation period. That construction also puts CERCLA in alignment with the traditional legal rules governing joint liability and contribution.[11]

The en banc court's contrary conclusion that CERCLA authorizes responsible parties to bring federal suits for contribution whenever they please endorses errant CERCLA-based contribution suits, subject to no express limitation period, arising out of the many contaminated sites throughout the Nation. See General Accounting Office, *Community Development: Local Growth Issues—Federal Opportunities and Challenges* (RCED-00-178) 118 (Sept. 2000). The federal courts face a substantial burden in resolving those complex cases, in which they confront the conceptually awkward task of ordering a responsible party to pay "contribution" to another responsible party when the joint liability they potentially owe to the federal or state government under CERCLA has not been discharged. See note 9, *supra*.[12]

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[11] See Restatement (Third) of Torts § 23 cmt. b (1999) ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment."); see also p. 10 & note 5, *supra*. That construction also allows a responsible party to clean up a CERCLA site voluntarily and apportion the costs among other responsible parties by entering into a settlement with the federal or state government to resolve its CERCLA liability, to the extent practicable within government resources. If a party enters into such a settlement, it would then be immune from contribution claims regarding matters addressed in the settlement, and it would have the express right to seek contribution from non-settling responsible parties, based on its discharge of the joint liability through the settlement. See CERCLA § 113(f)(2) and (3), 42 U.S.C. 9613(f)(2) and (3).

[12] Upon examination of the issue, Congress might wish to create an appropriate remedy, apart from contribution under Section 113(f), for responsible persons who engage in voluntary cleanups and seek to recover their costs from other responsible persons. A properly fashioned remedy could further Congress's objective of facilitating cleanup of "brownfields" sites, without requiring government enforcement actions or settlements and the resulting expenditures of limited government resources. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356. But as this Court noted in the context of CERCLA's provisions respecting recovery of attorney's fees, the matter "is a policy decision that must be made by Congress, not by the courts." See *Key Tronic Corp.*, 511 U.S. at 819, n.13 (quoting *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

Aviall's suit illustrates some of the potential problems posed by such CERCLA contribution claims. Aviall initially characterized its suit as "primarily, but not exclusively, a contract case," Pet. App. 92a, and the district court properly determined that the suit should be resolved in state court, *id.* at 99a-100a. In reversing, the en banc court opened the door for Aviall, or any other owner of a contaminated site, to bypass the state courts and initiate a federal suit, ostensibly for CERCLA "contribution," to recover expenditures for cleanup activities as CERCLA response costs. The federal courts will be responsible for applying CERCLA's complex provisions to what even Aviall characterized as "primarily" state law contract claims. It appears highly improbable that Congress intended for CERCLA to expand so dramatically the jurisdiction of the federal courts, when CERCLA's text gives the federal courts a far more structured and limited role. See *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) ("a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available").

This Court may, of course, allow the issue in this case to "percolate" in the lower courts until a conflict among the courts of appeals develops. But as *Rumpke* forebodes, and in view of the inevitably recurring nature of the issue, the prospects are high that a circuit split will emerge. The ensuing percolation is likely to impose a substantial cost on an

already overtaxed federal judiciary. Not only are there a substantial number of potential plaintiffs who may have an incentive to bring such suits, but those suits, which typically involve multiple parties, are inherently complex. They usually involve difficult questions of allocating necessary response costs based on expert testimony, including scientific inquiry about conditions at the site. And, as this case illustrates, they may import, through the federal court's supplemental jurisdiction, state law issues that would normally be resolved in state court.

In short, if the United States is correct that CERCLA does not authorize contribution claims in these circumstances, then allowing such litigation to go forward will result in a wasteful expenditure of time and resources for all concerned. This question is best resolved sooner rather than later, and it is sufficiently important to warrant resolution now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2003

(6)

FEB 2 3 2004

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner*

v.

AVIALL SERVICES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 12, 2003
CERTIORARI GRANTED JANUARY 9, 2004

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

U.S. District Court for the Northern District of Texas, Dallas Division

8/7/1997	Complaint filed by Aviall Services, Inc. ("Aviall") in U.S. District Court for Northern District of Texas (Dallas) (Dkt. 1)
9/23/1997	Answer to Complaint and Counterclaim filed by Cooper Industries, Inc. ("Cooper") (Dkt.)
1/26/1998	Answer by Aviall to Cooper's counterclaim (Dkt. 9)
1/12/1999	First Amended Complaint filed by Aviall (Dkt. 35)
2/1/1999	Answer to First Amended Complaint and Counterclaim by Cooper (Dkt. 37)
4/16/1999	Motion for Summary Judgment by Cooper and Memorandum in support thereof (Dkt. 51-52)
5/12/1999	Response by Aviall to Cooper's Motion for Summary Judgment (Dkt. 57)
5/28/1999	Reply by Cooper to Aviall's Response to Cooper's Motion for Summary Judgment (Dkt. 63)
11/29/1999	Second Amended Complaint by Aviall (Dkt. 78)

12/22/1999	Answer by Cooper to Second Amended Complaint and Continued Counterclaim (Dkt. 79)
1/5/2000	Oral argument on Cooper's Motion for Summary Judgment before Judge Sidney Fitzwater (Dkt. 80)
1/13/2000	Memorandum Opinion and Order granting Cooper's Motion for Summary Judgment, dismissing Aviall's Section 113(f)(1) contribution claim and remaining causes of action, and Cooper's counterclaim, without prejudice, and Judgment entered (Dkt. 82-83)
1/24/2000	Motion by Aviall for reconsideration of judgment and Memorandum in support of same (Dkt. 85-86)
1/25/2000	Order denying Aviall's motion for reconsideration (Dkt. 87)
2/16/2000	Notice of Appeal by Aviall (Dkt. 88)
12/10/2002	Opinion of Fifth Circuit reversing and remanding District Court judgment (Dkt. 90-91)
12/13/2002	Order reopening case (Dkt. 92)
1/21/2003	Joint Motion by Cooper and Aviall to stay proceedings pending resolution of Cooper's Petition for Certiorari in the U.S. Supreme Court (Dkt. 93)
1/22/2003	Agreed Order granting joint motion to stay pending resolution of Petition for

	Certiorari (Dkt. 94)
1022/2003	Order directing Administrative Closure (Dkt. 95)

U.S. Court of Appeals for the Fifth Circuit

1/24/2001	Supplemental Authorities filed by Aviall
2/5/2001	Supplemental Authorities filed by Cooper
2/24/2000	Notice of Appeal filed by Aviall and case docketed
5/22/2000	Appellant's Brief filed by Aviall
5/22/2000	Record Excerpts filed by Aviall
7/25/2000	Appellee's Brief filed by Cooper
8/21/2000	Reply Brief filed by Aviall
2/7/2001	Oral Argument to Panel of Judges Wiener, Barksdale, and Garza
8/14/2001	Opinion filed and Judgment entered Affirming District Court Judgment (Judge Wiener, dissenting)
9/4/2001	Petition for Rehearing *En Banc* by Aviall
12/10/2001	Response/ Opposition filed by Cooper to Aviall's Petition for Rehearing *En Banc*
12/19/2001	Order granting Petition for Rehearing *En Banc* and case reopened
2/18/2002	Supplemental Brief filed by Aviall
2/28/2002	Amicus Curiae Brief filed by by Amicus Curiae American Petroleum Institute, Amicus Curiae American Chemistry Counsel, and Amicus Curiae Texas Oil and Gas Association

3/28/2002	Supplemental Brief filed by Cooper
5/20/2002	Oral Argument heard *en banc*
6/19/2002	Amicus Curiae brief filed by Amicus Curiae United States
7/3/2002	Second Supplemental Brief filed by Cooper in response to brief by Amicus Curiae United States
7/3/2002	Second Supplemental Brief filed by Aviall in response to brief by Amicus Curiae United States
11/14/2002	*En Banc* Opinion filed and Judgment entered, reversing panel decision, reversing District Court judgment, remanding case to District Court (Judges Garza, Smith, and Barksdale, dissenting)
2/24/2003	Notice from U.S. Supreme Court of filing of Petition for Certiorari by Cooper

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES INCORPORATED	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. ___
COOPER INDUSTRIES. INC.	§	COMPLAINT
Defendant	§	

COMPLAINT

Aviall Services, Incorporated ("Aviall"), for its Complaint against Defendant Cooper Industries, Inc. ("Cooper"), alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action, under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended (hereafter "CERCLA") and under the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. Chapter 361 ("SWDA") seeking (1) reimbursement of certain investigation and remediation costs incurred by Aviall in response to the release or threat of release of hazardous substances and petroleum hydrocarbons on, under and about the properties known as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility (collectively identified herein as the "Facilities"); and (2) declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to

Defendant's liability for further response costs incurred and to be incurred by Aviall at the Facilities.

2. This action is also instituted under the statutory and common laws of the State of Texas seeking abatement, damages to property value, cost of repair and such other relief as just and proper.

JURISDICTION AND VENUE

3. This Court has exclusive jurisdiction over the subject matter of this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has federal question jurisdiction under 28 U.S.C. § 1331 for this civil action arising under the laws of the United States. Venue is proper in this District pursuant to Section 113(b), 42 U.S.C. § 9613(b) because the Facilities are located within this District and the release of hazardous substances and petroleum hydrocarbons occurred within this District.

4. The SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of contract claims are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution. This Court has supplemental jurisdiction over the SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of contract claims pursuant to 28 U.S.C. § 1367 and the doctrine of pendant jurisdiction.

PARTIES

5. Plaintiff Aviall is a Delaware corporation and has its principal place of business in the State of Texas.

6. Defendant Cooper Industries, Inc., is a [sic] Ohio corporation doing business in the State of Texas. Defendant may be served with citation by delivering a copy of the

citation and this Complaint to its registered agent, CT Corporation System, 801 Dallas Avenue, Houston, Texas 77002.

BACKGROUND

7. The subject of this action concerns costs, fees and damages arising out of releases and threatened releases of hazardous materials and petroleum hydrocarbons at four facilities known individually as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility at which Cooper and its predecessors conducted aircraft engine overhaul and maintenance operations. All four facilities are located either in Dallas, Texas near Love Field or in Fort Worth in the vicinity of the Dallas/Fort Worth International Airport.

Forest Park Facility

8. The Forest Park Facility is located at 6114 Forest Park Road, Dallas, Texas. Beginning in the late 1940's, Texas Aircraft & Engine Company ("TA&EC") and Texas Metal & Manufacturing Company ("TM&MC") conducted engine rebuilding and metal fabricating operations at that location.

9. In 1949, Cooper's predecessor, Aviation Activities Company ("AAC"), acquired TA&EC and TM&MC. On information and belief, AAC merged AAC, TA&EC and TM&MC and formed a new company known as Dallas Airmotive.

10. Dallas Airmotive, also Cooper's predecessor, continued the engine rebuilding and metal fabricating operations at the Forest Park Facility. These operations consisted, in part, of cleaning engines; painting, stripping and plating engine parts; assembling engines; testing engines; maintaining and operating underground storage

tanks and tank farms; and using, receiving and storing hazardous materials and petroleum hydrocarbons.

11. During the course of their operations, Cooper's predecessors disposed of and released hazardous materials and petroleum hydrocarbons at the Forest Park Facility. Without limitation, Cooper's predecessors buried drums of waste containing hydrochloric acid; dumped spent trichloroethylene ("TCE") used in their plating operations onto the bare ground; released into the environment TCE used to wash engines located in test cells; allowed petroleum storage tanks to overflow their contents onto the ground; buried silver plating sludges in soils; and corroded drains with acids while releasing into the drains metals, plating solutions and solvents.

Carter Field Facility

12. In 1955, Cooper's predecessor, Southwest Airmotive Company ("Southwest Airmotive"), began aircraft engine maintenance operations at Carter Field located at 15225 F.A.A. Boulevard, Forth Worth, Texas.

13. At the Carter Field Facility, Cooper's predecessor assembled, disassembled and tested aircraft engines and used, received and stored hazardous materials and petroleum hydrocarbons.

14. During the course of such operations, Cooper's predecessor released and disposed of hazardous substances and petroleum hydrocarbons into the environment. Such releases and disposals include, but are not limited to, overfilling of storage tanks with jet fuel, releasing of hazardous substances into drains, and periodic overflowing an oil/water separator with hazardous materials and petroleum hydrocarbons.

Love Field Facility

15. Beginning in 1931, Cooper's predecessor, Edwin F. Booth, Inc. began piston engine maintenance operations at the Love Field Facility located at 9311 Reeves Street, Dallas, Texas.

16. Southwest Airmotive was subsequently formed from the successor corporation to Edwin F. Booth, Inc., Booth-Herring, Inc. Southwest Airmotive continued aircraft engine overhaul operations at the Love Field Facility and eventually added 3300 Lemmon Avenue, Dallas, Texas to the Love Field Facility.

17. The aircraft engine operations conducted by Cooper's predecessors at Love Field include, but are not limited to, overhauling aircraft engines, which involved cleaning aircraft engines; painting, stripping and plating engine parts; assembling engines; testing engines; refueling of aircraft; maintaining and operating underground storage tanks and tank farms; and using, receiving, and storing hazardous materials and petroleum hydrocarbons.

18. During the course of such operations, Cooper's predecessors overfilled jet fuel storage tanks and disposed of jet fuel onto bare ground, allowed tanks and related piping to leak petroleum hydrocarbons into the surrounding environment, and caused barrels containing chemicals to accumulate and deteriorate on bare ground, leaking their contents into soils and groundwater. Further, Cooper's predecessors overfilled sumps in the plating shop with solvents and plating waste, draining such chemicals into the ground.

Lemmon Terminal Facility

19. The Lemmon Terminal Facility is located at 7511 and 7515 Lemmon Avenue, Dallas, Texas. Beginning in the

1950's, Cooper's predecessor, Southwest Airmotive, conducted engine maintenance fueling and storage at that location.

20. In connection with such operations, Cooper's predecessor overfilled fuel tanks, allowed dripping and spilling of petroleum hydrocarbons onto soils, spilled petroleum hydrocarbons onto the ground in its weed control activities, and allowed tanks and piping to deteriorate, thereby releasing petroleum hydrocarbons into soils and potentially groundwater. In addition, Cooper's predecessors released non-halogenated solvents into soils.

Cooper's Acquisition of the Facilities

21. In 1970, Dallas Airmotive merged with Cooper, and Cooper assumed all liabilities of Dallas Airmotive in the merger, including the liabilities related to the Forest Park Facility.

22. After the merger, Cooper continued the operations of Dallas Airmotive at the Forest Park Facility and continued to release and dispose of hazardous materials and petroleum hydrocarbons into the environment.

23. As a result of the acts and omissions of Cooper and its predecessors, hazardous materials and petroleum hydrocarbons released by Cooper and its predecessors at the Forest Park Facility have been detected in groundwater and soil at the facility including, but not limited to, phase separated hydrocarbons, chlorobenzenes, cis-1,2-dichloroethene (cis-1,2-DCE), perchloroethene, TCE, 1,1-dichloroethene (1,1-DCE), vinyl chloride, and hexavalent chromium. Certain hazardous materials released at the Forest Park Facility by Cooper and its predecessors have migrated through groundwater off of the Forest Park Facility property.

24. In 1973, Cooper acquired Southwest Airmotive pursuant to a merger in which Cooper assumed the obligations and liabilities of Southwest Airmotive at the Carter Field, Love Field and Lemmon Terminal Facilities.

25. Further, Cooper continued the operations of its predecessor, Southwest Airmotive, at the Carter Field, Love Field and Lemmon Terminal Facilities and continued to dispose of and release hazardous materials and petroleum hydrocarbons into the soils and groundwater at the Facilities.

26. As a result of the operations of Cooper and its predecessors at the Carter Field Facility, elevated concentrations of total petroleum hydrocarbons, benzene, toluene, ethylbenzene, and xylenes were identified in soils at the Carter Field Facility. Further, groundwater monitoring wells have identified the on-site presence of 1,l,DCE, vinyl chloride, phase-separated hydrocarbons and halogenated solvents at the Carter Field Facility.

27. As a result of the operations of Cooper and its predecessors at the Love Field Facility, unsaturated halocarbons including 1,1-DCE, cis-1,2-DCE, perchloroethene, TCE, petroleum hydrocarbons and vinyl chloride have been detected in soils. Certain unsaturated halocarbons have also been detected in groundwater at the Love Field Facility. Further, four hydrocarbon plumes exist in the groundwater at the Love Field Facility.

28. As a result of the acts and omissions of Cooper and its predecessor at the Lemmon Terminal Facility, gasoline, jet fuel, acetone, and non-halogenated solvent methylethylketone have been detected in soils in and around the on-site sewer catch basins and/or tank farm, among other areas.

29. The contamination caused by Cooper and its predecessors at the Facilities constituted unauthorized discharges prohibited by Texas Water Code Section 26.121 and Fort Worth City Code, Chapter 49 and/or Dallas City Codes, Chapter 7A.

Aviall's Acquisition of the Facilities

30. In 1981, Aviall purchased the assets of Cooper, including the Forest Park, Love Field, Lemmon Terminal and Carter Field Facilities.

31. Aviall and Cooper entered a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement") which set forth the terms and conditions of the sale. Pursuant to the Agreement, Cooper assumed all liabilities arising out of pre-closing environmental contamination.

32. Cooper has refused to honor and follow the Agreement and its obligations under Texas and federal laws by failing to undertake any environmental responsibilities associated with pre-closing disposals and releases of hazardous materials and petroleum hydrocarbons.

33 In 1995 and 1996, Aviall entered two separate sales through which it sold all of its interests in the Facilities. Under the terms and conditions of such sales, Aviall has retained environmental obligations with respect to the Facilities.

34. Aviall has cooperated with the State of Texas to investigate and clean up the aforementioned contamination. Thus far, Aviall has incurred over $5,000,000 in costs to respond to, investigate, and remediate contamination at the Facilities. Aviall anticipates that such costs will eventually total approximately $21,000,000. Further, Aviall has suffered diminution in value of the Facilities and the risk of liability to off-site landowners.

35. Aviall has incurred response costs consistent with the National Contingency Plan ("NCP") pursuant to CERCLA and will incur further response costs consistent with the NCP pursuant to CERCLA in the future.

36. The response, investigation and remediation costs incurred by Aviall were also reasonable, necessary and required by the Texas Natural Resource Conservation Commission ("TNRCC"), or its predecessors.

FIRST CLAIM FOR RELIEF AGAINST COOPER
(CERCLA Cost Recovery)

37. Aviall incorporates the averments of Paragraphs 1-36 as if set out verbatim.

38. Aviall is entitled to recover from Cooper, pursuant to 42 U.S.C. § 9607, response costs incurred or to be incurred by Aviall under CERCLA in connection with the Facilities.

39. A "disposal" and "release" and/or threatened release of "hazardous substances" has occurred at the Facilities as defined by Sections 101(14), (22), and (29) of CERCLA, 42 U.S.C. §§ 9601(14), (22), and (29) of CERCLA.

40. Cooper is a responsible party under Section 107(a), 42 U.S.C. § 9607(a), of CERCLA as a past owner and operator of the Facilities at the time of disposal of hazardous substances and as an arranger for disposal of hazardous substances at the Facilities.

41. Each of the Facilities constitutes a "facility" as required by Section 107(a), 42 U.S.C. § 9607(a), of CERCLA because hazardous substances have come to be located at the Facilities.

42. Aviall has incurred recoverable response costs in responding to the contamination at the Facilities that are consistent with the NCP, 40 C.F.R. Part 300.

43. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

SECOND CLAIM FOR RELIEF AGAINST COOPER
(CERCLA Contribution)

44. Aviall incorporates the averments of Paragraphs 1-43 as if set out verbatim.

45. Pursuant to CERCLA, 42 U.S.C. § 9613(f)(1), Aviall is entitled to seek contribution from Cooper, as a person liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), for any response costs and other liability Aviall has incurred or may incur under CERCLA in connection with the Facilities.

46. Aviall is entitled to contribution for all such response costs and other liability on the basis of equitable factors, including, but not limited to:

A. For over thirty years, Cooper and its predecessors owned and operated the Facilities during which time they managed and controlled waste handling and disposal practices at the Facilities and generated contamination at and from the Facilities.

B. In contrast to Cooper, Aviall has cooperated with government efforts regarding investigation and cleanup of the Facilities.

C. If Aviall bore the response costs for which Cooper is directly responsible, Cooper would obtain a windfall at Aviall's expense.

D. Cooper and Aviall agreed pursuant to the Agreement that Cooper would bear all liabilities as between them for response and remedial action costs arising out of Cooper's pre-closing operation and ownership of the Facilities.

47. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

THIRD CLAIM FOR RELIEF AGAINST COOPER
(SWDA Contribution)

48. Aviall incorporates the averments of Paragraphs 1-47 as if set out verbatim.

49. Pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a), as amended, Aviall is entitled to recover from Cooper the costs of the removal or remedial actions conducted by Aviall in connection with its former Facilities.

50. Such removal and remedial actions were approved by the TNRCC and were reasonable and necessary to address a release or threatened release of a solid waste as defined by the SWDA.

51. Aviall is entitled, pursuant to 28 U.S.C. §§ 2201-2202 and TEX. CIV. PRAC. & REM. CODE ANN. Section

37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a) and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

FOURTH CLAIM FOR RELIEF AGAINST COOPER
(Negligence and Negligence Per Se)

52. Aviall incorporates the averments of Paragraphs 1-51 as if set out verbatim.

53. The actions and omissions of Cooper and its predecessors in connection with their operations at the former Aviall Facilities were negligent.

54. Cooper owes Aviall a duty to exercise ordinary care in the conduct of its and its predecessors' operations at the Facilities and has a duty to conduct such operations in a reasonable and prudent manner so that soils and groundwater are not polluted by petroleum hydrocarbons, solvents and other substances.

55. Cooper's conduct and that of its predecessors' constitutes a breach and continuing breach of these duties, giving rise to negligence and negligence per se.

56. Such negligence is a proximate cause of Aviall's injuries. Cooper's wrongful acts include, without limitation, the following:

A. Failure to properly dispose of hazardous materials and drums containing hazardous materials;

B. Failure to adequately inspect underground storage tank systems, waste lines, and storage facilities;

C. Failure to timely repair leaks and other equipment failures;

D. Failure to timely report and/or notify the TNRCC or its predecessors of known and suspected leaks; disposals or spills;

E. Failure to comply with applicable environmental laws including, but not limited to, TEXAS WATER CODE Section 26.121, which prohibits pollution of the waters of Texas except as authorized by the TNRCC;

F. Failure to notify and/or warn Aviall of conditions causing and potentially causing contamination;

G. Failure to operate in accordance with prudent operating standards in the industry;

H. Failure to adequately protect the natural resources of the State of Texas, including its groundwater;

I. Failure to adequately train and supervise personnel with respect to proper waste disposal practices;

J. Failure to adequately train and supervise personnel to conduct operations in accordance with the laws, orders and rules of the State of Texas and the codes of the Cities of Dallas and Fort Worth; and

K. Failure to investigate, remediate, and take affirmative actions to investigate, respond to, abate and eliminate the contamination and hazardous conditions existing at the Facilities.

57. Cooper knew or should have known that such failures as described in Paragraph 56 above would cause pollution of the soil and groundwater at the Facilities.

58. The negligent or grossly negligent actions and omissions of Cooper have caused damage to Aviall. As a proximate result of Cooper's negligent acts and omissions, as set forth herein, Aviall has suffered and in the future will suffer injuries related to the contamination.

59. Cooper's actions and inactions allowing pollutants and hazardous materials to enter surface and subsurface soils and groundwater are direct violations of Texas rules and regulations and Dallas and Fort Worth codes designed to prevent pollution and injury to entities like Aviall, amounting to negligence per se.

FIFTH CLAIM FOR RELIEF AGAINST COOPER
(Gross Negligence)

60. Aviall incorporates the averments of Paragraphs 1-59 as if set out verbatim.

61. Cooper's operations at the Facilities have been managed and performed with such lack of care and such reckless disregard for the protection of the surface and subsurface of the Facilities that such conduct amounts to gross negligence or willful misconduct as a matter of law. Coopers' wrongful conduct, acts and omissions constituting gross negligence consist of, but are not limited to, the following:

a. Cooper's conscious business decision to engage in illegal waste disposal methods and the resulting contamination problems caused thereby; and

b. The knowledge of and conscious indifference to the risks involved and consequences of ignoring the threat to groundwater, the environment and public health and safety posed by Cooper's failure to comply with Dallas and Fort Worth codes and Texas laws, rules, orders and regulations and failure to take

any steps to prevent injury to Aviall and the public as a result of Cooper's acts and omissions.

62. Cooper's conduct constitutes a breach and continuing breach of the duties giving rise to this gross negligence count.

SIXTH CLAIM FOR RELIEF AGAINST COOPER
(Trespass)

63. Aviall incorporates the averments of Paragraphs 1-62 as if set out verbatim.

64. In the course of engaging in the acts and omissions described herein, Cooper has caused and allowed the release, escape and migration of hazardous materials and petroleum products into the soils and groundwater underlying Aviall's former property.

65. Cooper caused or allowed the entry of petroleum hydrocarbons, solvents and other substances upon and under Aviall's former property without Aviall's permission or invitation. Aviall was, at the time of its previous occupation of the Facilities, lawfully entitled to possession of the real estate at issue.

66. Cooper intentionally conducted operations in such a manner as to either not guard against, or to purposefully allow or cause, pollutants and other hazardous materials to migrate into and contaminate the surface and subsurface soil and groundwater in violation of Aviall's former vested property rights. This constituted an intentional invasion of Aviall's former property, thus constituting an intentional trespass and continuing trespass as those terms are defined and understood under the laws and statutes of the State of Texas. Such intentional trespass was also a legal or contributing cause to Aviall's damages as herein alleged.

67. Cooper's intentional trespass constitutes the proximate cause of injury, damage and loss to Aviall.

SEVENTH CLAIM FOR RELIEF AGAINST COOPER
(Private Nuisance)

68. Aviall incorporates the averments of Paragraphs 1-67 as if set out verbatim.

69. Cooper knew to a reasonable certainty, or in the exercise of ordinary care should have known, that its acts and omissions would cause material harm to Aviall as well as substantial costs to clean up contamination. Cooper has voluntarily, intentionally, or negligently interfered with the use and enjoyment of Aviall's former property. Cooper's acts and omissions have caused and continue to cause pollutants and other hazardous substances to enter the Facilities amounting to a present and continuing nuisance.

70. Further, the acts and omissions of Cooper were an intentional invasion of Aviall's former interest in the Facilities, including the surface, subsurface and groundwater beneath the land, or in the alternative, a negligent invasion of Aviall's former property interests in the surface, subsurface and groundwater beneath the Facilities. This invasion of Aviall's former property interests has interfered and is continuing to interfere with the use and enjoyment of the Facilities and the normal and expected use and enjoyment of the Facilities and groundwater. These acts committed by Cooper constitute a nuisance. Such nuisance is also a legal and contributing cause of injury to the Facilities.

71. The pollution caused by Cooper is continuing, exists today and will, in all likelihood, continue into the future, thus constituting a continuing tort. Cooper has violated its common-law obligations to abate and correct the continuing nuisance it created. As alleged above, Cooper's actions are

and were intentional or reckless, such that the harm to Aviall's interests were substantially certain to follow.

72. The presence of petroleum hydrocarbons, solvents and other hazardous materials in groundwater and soil is offensive, inconvenient and annoying to persons with normal sensibilities in the surrounding community.

73. The nuisances created by Cooper subvert the welfare of the environment and public and constitute an obstruction of public rights with respect to Aviall and landowners surrounding the Facilities.

74. As a result of the nuisance created by Cooper and its offensive and injurious effects, Aviall has been forced to incur response and remediation costs and other costs associated with damage to the Facilities.

EIGHTH CLAIM FOR RELIEF AGAINST COOPER
(Public Nuisance)

75. Aviall incorporates the averments of Paragraphs 1-74 as if set out verbatim.

76. Cooper's acts and omissions remain a source of continuing pollution for which Cooper has refused to accept responsibility. Cooper's acts and omissions have caused and continue to cause pollutants and other hazardous materials to emanate from certain Facilities amounting to a present and continuing public nuisance.

77. In committing these acts and omissions, Cooper has created, maintained and refused to abate a public nuisance, contrary to the laws of the State of Texas. Further, Cooper willfully and intentionally, and in utter disregard of these laws, damaged and continues to damage the Facilities. Cooper's actions resulting in the contamination of soils and groundwater have subverted and are subverting the public order and have constituted and are constituting an

obstruction of the public's rights. Aviall has suffered damages in the form of response costs, remediation costs, diminution to real property value and repair costs.

NINTH CLAIM FOR RELIEF AGAINST COOPER
(Breach of Contract by Cooper)

78. Aviall incorporates the averments of Paragraphs 1-77 as if set out verbatim.

79. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper retained all risk of costs, damages and liabilities arising out of pre-closing disposals of hazardous materials and contamination.

80. Cooper agreed to retain all liabilities or obligations not expressly assumed by Aviall under the Agreement, those liabilities and obligations covered by Cooper's insurance, and/or all liabilities or obligations constituting a violation of federal, state or local law or requirement of any governmental authority.

81. Aviall has incurred costs and liabilities related to Cooper's violation of applicable law and governmental authority governing Cooper's acts at the Facilities. Such costs and liabilities arise out of Cooper's acts and omissions resulting in the contamination of soils and groundwater at the Facilities. Moreover, Aviall itself never agreed to assume such costs and liabilities under the Agreement.

82. Aviall has requested that Cooper undertake its obligations and liabilities under the Agreement, and Cooper breached its duties under the Agreement by refusing to assume and satisfy such obligations and liabilities.

83. Aviall has incurred and continues to incur substantial damages as a result of Cooper's breaches of the Agreement.

WHEREFORE, Aviall prays for the relief requested above, for costs, attorneys fees, interest as allowed by law and for general relief.

DATED: August 7, 1997

Respectfully submitted,

GARDERE & WYNNE, L.L.P
/s/
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By permission
/s/ Joan Krajewski

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES INCORPORATED	§	
PLAINTIFF,	§	
VS.	§	CIVIL ACTION NO. 3-97CV1926-D
COOPER INDUSTRIES. INC.	§	FIRST AMENDED COMPLAINT
DEFENDANT.	§	

§

FIRST AMENDED COMPLAINT

Aviall Services, Incorporated ("Aviall"), for its First Amended Complaint against Defendant Cooper Industries, Inc. ("Cooper"), alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action, under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended (hereafter "CERCLA"), under the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361 ("SWDA"), and the Texas Water Code § 26.3513 seeking (1) reimbursement of certain investigation and remediation costs incurred by Aviall in response to the release or threat of release of hazardous substances and petroleum hydrocarbons on, under and about the properties known as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility (collectively identified herein as the "Facilities"); and (2)

declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to Defendant's liability for further response costs incurred and to be incurred by Aviall at the Facilities.

2. This action is also instituted under the common laws of the State of Texas for breach of contract, breach of warranty and contractual indemnity arising from a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement"), seeking abatement, damages to property value, cost of repair and such other relief as just and proper. An alternative claim in quantum meruit to preclude Cooper from being unjustly enriched by Aviall's remediation activities is also asserted herein.

JURISDICTION AND VENUE

3. This Court has exclusive jurisdiction over the subject matter of this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has federal question jurisdiction under 28 U.S.C. § 1331 for this civil action arising under the laws of the United States. Venue is proper in this District pursuant to Section 113(b), 42 U.S.C. § 9613(b) because the Facilities are located within this District and the release of hazardous substances and petroleum hydrocarbons occurred within this District. The amount in controversy exceeds the amount required for adjudication by this Court.

4. The SWDA, Texas Water Code, breach of contract, breach of warranty, and contractual indemnity and quantum meruit claims are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution. This Court has supplemental jurisdiction over the SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of

contract claims pursuant to 28 U.S.C. § 1367 and the doctrine of pendent jurisdiction.

PARTIES

5. Plaintiff Aviall is a Delaware corporation and has its principal place of business in the State of Texas.

6. Defendant Cooper Industries, Inc., is a [sic] Ohio corporation doing business in the State of Texas. Defendant may be served with citation by delivering a copy of the citation and this Complaint to its registered agent, CT Corporation System, 801 Dallas Avenue, Houston, Texas 77002.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

7. The subject of this action concerns costs, fees and damages arising out of releases and threatened releases of hazardous materials and petroleum hydrocarbons at four facilities known individually as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility. At those facilities, Cooper and its predecessors conducted aircraft engine overhaul and/or maintenance operations. All four facilities are located either in Dallas, Texas near Love Field Airport or in Fort Worth in the vicinity of the Dallas/Fort Worth International Airport. The factual background for each facility and the conduct of the parties is alleged below.

Forest Park Facility

8. The Forest Park Facility is located at 6114 Forest Park Road, Dallas, Texas. Beginning in the late 1940's, Texas Aircraft & Engine Company ("TA&EC") and Texas Metal & Manufacturing Company ("TM&MC") conducted engine rebuilding and metal fabricating operations at that location.

9. In 1949, Cooper's predecessor, Aviation Activities Company ("AAC"), acquired TA&EC and TM&MC. On information and belief, AAC merged AAC, TA&EC and TM&MC and formed a new company known as Dallas Airmotive.

10. Dallas Airmotive, also Cooper's predecessor, continued the engine rebuilding and metal fabricating operations at the Forest Park Facility. These operations consisted, in part, of cleaning engines; painting, stripping and plating engine parts; assembling engines; testing engines; maintaining and operating underground storage tanks and tank farms; and using, receiving and storing hazardous materials and petroleum hydrocarbons.

11. During the course of their operations, Cooper's predecessors disposed of and released hazardous materials and petroleum hydrocarbons at the Forest Park Facility. Without limitation, Cooper's predecessors buried drums of waste containing hydrochloric acid; dumped spent trichloroethylene ("TCE") used in their plating operations onto the bare ground; released into the environment TCE used to wash engines located in test cells; allowed petroleum storage tanks to overflow their contents onto the ground; buried silver plating sludges in soils; and corroded drains with acids while releasing into the drains metals, plating solutions and solvents.

Carter Field Facility

12. In 1955, Cooper's predecessor, Southwest Airmotive Company ("Southwest Airmotive"), began aircraft engine maintenance operations at Carter Field located at 15225 F.A.A. Boulevard, Forth Worth, Texas.

13. At the Carter Field Facility, Cooper's predecessor assembled, disassembled and tested aircraft

engines and used, received and stored hazardous materials and petroleum hydrocarbons.

14. During the course of such operations, Cooper's predecessor released and disposed of hazardous substances and petroleum hydrocarbons into the environment. Such releases and disposals include, but are not limited to, overfilling of storage tanks with jet fuel, releasing of hazardous substances into drains, and periodic overflowing of an oil/water separator with hazardous materials and petroleum hydrocarbons.

Love Field Facility

15. Beginning in 1931, Cooper's predecessor, Edwin F. Booth, Inc. began piston engine maintenance operations at the Love Field Facility located at 9311 Reeves Street, Dallas, Texas.

16. Southwest Airmotive was subsequently formed from the successor corporation to Edwin F. Booth, Inc., Booth-Herring, Inc. Southwest Airmotive continued aircraft engine overhaul operations at the Love Field Facility and eventually added 3300 Lemmon Avenue, Dallas, Texas to the Love Field Facility.

17. The aircraft engine operations conducted by Cooper's predecessors at Love Field include, but are not limited to, overhauling aircraft engines, which involved cleaning aircraft engines; painting, stripping and plating engine parts; assembling engines; testing engines; refueling of aircraft; maintaining and operating underground storage tanks and tank farms; and using, receiving, and storing hazardous materials and petroleum hydrocarbons.

18. During the course of such operations, Cooper's predecessors overfilled jet fuel storage tanks and disposed of jet fuel onto bare ground, allowed tanks and related piping to leak petroleum hydrocarbons into the

surrounding environment, and caused barrels containing chemicals to accumulate and deteriorate on bare ground, leaking their contents into soils and groundwater. Further, Cooper's predecessors overfilled sumps in the plating shop with solvents and plating waste, draining such chemicals into the ground.

Lemmon Terminal Facility

19. The Lemmon Terminal Facility is located at 7511 and 7515 Lemmon Avenue, Dallas, Texas. Beginning in the 1950's, Cooper's predecessor, Southwest Airmotive, conducted aircraft maintenance, fueling and storage at that location.

20. In connection with such operations, Cooper's predecessor overfilled fuel tanks, allowed dripping and spilling of petroleum hydrocarbons onto soils, spilled petroleum hydrocarbons onto the ground in its fueling and weed control activities, and allowed tanks and piping to deteriorate, thereby releasing petroleum hydrocarbons into soils and potentially groundwater. In addition, Cooper's predecessors released non-halogenated solvents into soils.

Cooper's Acquisition of the Forest Park Facility

21. In 1970, Cooper purchased Dallas Airmotive and merged Dallas Airmotive into Cooper. As a result of this merger, Cooper assumed all obligations of and belongings to Dallas Airmotive, including the environmental liabilities relating to the Forest Park Facility.

22. After the merger, Cooper continued operations and purchased additional, adjacent property at the Forest Park Facility and continued to release and dispose of hazardous materials and petroleum hydrocarbons into the environment.

Pollution at the Forest Park Facility by Cooper and its [sic] Predecessors

23. As a result of the acts and omissions of Cooper and its predecessors, hazardous materials and petroleum hydrocarbons released by Cooper and its predecessors at the Forest Park Facility have been detected in groundwater and soil at the facility including, but not limited to, phase separated hydrocarbons, chlorobenzenes, cis-1,2-dichloroethene (cis-1,2-DCE), perchloroethene, TCE, 1,1-dichloroethene (1,1-DCE), vinyl chloride, and hexavalent chromium. Certain hazardous materials released at the Forest Park Facility by Cooper and its predecessors have migrated through groundwater off of the Forest Park Facility property.

Cooper's Acquisition of the Carter Field, Love Field and Lemmon Terminal Facilities

24. In 1973, Cooper purchased the stock of Southwest Airmotive, Inc. As a result of the stock purchase, Cooper assumed the obligations and liabilities of Southwest Airmotive at the Carter Field, Love Field and Lemmon Terminal Facilities.

Cooper's Pollution of the Carter Field, Love Field and Lemmon Terminal Facilities

25. Further, Cooper continued the operations at the Carter Field, Love Field and Lemmon Terminal Facilities and continued to dispose of and release hazardous materials and petroleum hydrocarbons into the soils and groundwater at the Facilities.

26. As a result of the operations of Cooper and its predecessors at the Carter Field Facility, elevated concentrations of total petroleum hydrocarbons, benzene, toluene, ethylbenzene, and xylenes were identified in soils at

the Carter Field Facility. Further, groundwater monitoring wells have identified the on-site presence of 1,1-DCE, vinyl chloride, dissolved-phase hydrocarbons and halogenated solvents at the Carter Field Facility.

27. As a result of the operations of Cooper and its predecessors at the Love Field Facility, unsaturated halocarbons including 1,1-DCE, cis-1,2-DCE, perchloroethene, TCE, petroleum hydrocarbons and vinyl chloride have been detected in soils. Certain unsaturated halocarbons and dissolved-phase hydrocarbons have also been detected in groundwater at the Love Field Facility. Further, four hydrocarbon plumes exist in the soil and groundwater at the Love Field Facility.

28 As a result of the acts and omissions of Cooper and its predecessor at the Lemmon Terminal Facility, gasoline, jet fuel, acetone, and non-halogenated solvent methylethylketone have been detected in soils in and around the on-site sewer catch basins and/or tank farm, among other areas.

29. The contamination caused by Cooper and its predecessors at the Facilities constituted unauthorized discharges prohibited by applicable law, the Texas Water Code Section 26.121 and Fort Worth City Code, Chapter 49 and/or Dallas City Codes, Chapter 7A.

Aviall's Acquisition of the Facilities from Cooper - The Asset Purchase Agreement

30. In 1981, Aviall (through Aviall's predecessor, Aviation Power Supply, Inc.) purchased certain assets of Cooper, including the operations at the Forest Park, Love Field, Lemmon Terminal and Carter Field Facilities.

31. Aviall and Cooper entered a written Asset Purchase Agreement, dated December 10, 1981

("Agreement") which set forth the terms and conditions of the sale. Pursuant to the Agreement, Cooper retained all liabilities arising out of pre-closing environmental contamination.

32. Additionally, Cooper represented, in consideration for the Agreement, that Cooper was not in violation of any law, regulation or requirement relating to the Facilities, including without limitation applicable environmental protection laws and regulations. This representation was false. In fact, at the time of closing the Agreement, Cooper was in violation of environmental protection laws and regulations.

33. In consideration for the Agreement, Cooper entered into an "affirmative covenant" that, prior to closing, Cooper would comply with all legal requirements and contractual obligations applicable to the purchased assets. In fact, Cooper did not comply with all legal requirements and contractual obligations prior to the closing date.

34. In the Agreement, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. In fact, Cooper failed to inform Aviall of material variances in environmental compliance from the representations made in Section 4.09(f) of the Agreement.

35. Cooper has refused to honor and follow the Agreement and its obligations under Texas and federal laws by failing to recognize, accept and undertake any environmental responsibilities associated with pre-closing disposals and releases of hazardous materials and petroleum hydrocarbons at the Facilities.

Aviall's Sales of the Facilities and Standing to Sue

36. In 1995 and 1996, Aviall entered two separate sales through which it sold all of its interests in the Facilities.

Under the terms and conditions of such sales, Aviall has retained pre-closing environmental obligations with respect to the Facilities. Accordingly Aviall has standing to prosecute this action.

Aviall's Costs

37. Aviall has cooperated with the State of Texas to investigate and clean up the aforementioned contamination. Thus far, Aviall has incurred over $5,000,000 in costs to respond to, investigate, and remediate contamination at the Facilities. Aviall anticipates that such costs could exceed $21,000,000. Further, Aviall has suffered diminution in value of the Facilities through the 1995 and 1996 sales and the risk of liability to off-site landowners.

38. Aviall has incurred response costs consistent with the National Contingency Plan ("NCP") pursuant to CERCLA and will incur further response costs consistent with the NCP pursuant to CERCLA in the future, as well as costs reimbursable under the laws of the State of Texas.

39. The response, investigation and remediation costs incurred by Aviall were also reasonable, necessary and required by the Texas Natural Resource Conservation Commission ("TNRCC") or its predecessors.

40. A "disposal" and "release" and/or threatened release of "hazardous substances" and or "hazardous waste" has occurred at the Facilities as defined by Sections 101(14), (22), and (29) of CERCLA, 42 U.S.C. §§ 9601(14), (22), and (29) of CERCLA and by TEX. HEALTH & SAFETY CODE ANN. Sec. 361.003.

41. Cooper is a person who is a responsible party under Section 107(a), 42 U.S.C. § 9607(a), of CERCLA as a past owner and operator of the Facilities at the time of disposal of hazardous substances and as an arranger for disposal of hazardous substances at the Facilities.

42. Forest Park, Love Field and Carter Field each constitute a "facility" as required by Section 107(a), 42 U.S.C. § 9607(a), of CERCLA. Hazardous substances have come to be located at the Facilities.

43. Aviall has incurred recoverable response costs in responding to the contamination at the Facilities that are consistent with the NCP, 40 C.F.R. Part 300.

FIRST CLAIM FOR RELIEF AGAINST COOPER

(Breach of Contract by Cooper)

44. Aviall incorporates the averments of Paragraphs 1-43 as if set out verbatim.

45. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper retained all risk of costs, damages and liabilities arising out of pre-closing disposals of hazardous materials and contamination.

46. Cooper agreed to retain all liabilities or obligations (i) not expressly assumed by Aviall under the Agreement, (ii) those liabilities and obligations covered by Cooper's insurance, and/or (iii) all liabilities or obligations constituting a violation of federal, state or local law or requirement of any governmental authority. Additionally, in the Agreement, Cooper falsely represented that it was not in violation of any law, regulation or requirement relating to the Facilities, including, without limitation, applicable environmental protection laws and regulations. Moreover, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. Notwithstanding this Agreement, Cooper entirely failed to inform Aviall of the material variances from its representations and warranties of environmental compliance.

47. Aviall has incurred costs and liabilities related to Cooper's violation of applicable law and governmental

authorities' requirements governing Cooper's acts at the Facilities. Such costs and liabilities arise out of Cooper's acts and omissions resulting in the contamination of soils and groundwater at the Facilities. Moreover, Aviall itself never agreed to assume such costs and liabilities under the Agreement.

48. Aviall has requested that Cooper undertake its obligations and liabilities under the Agreement. Cooper has breached its duties under the Agreement by refusing to assume and satisfy such obligations and liabilities. Moreover, by refusing to honor its obligations, Cooper has engaged in an anticipatory breach of the Agreement, thereby entitling Aviall to recover damages for costs to be incurred in the future as a proximate result of Cooper's anticipatory breach.

49. Aviall has incurred and continues to incur substantial damages proximately caused as a result of Cooper's breaches of the Agreement. In reasonable probability, Aviall will incur substantial damages in the future as a result of Cooper's anticipatory breach of the Agreement.

SECOND CLAIM FOR RELIEF AGAINST COOPER
(Breach of Warranty)

50. Aviall incorporates the averments of Paragraphs 1-49 as if set out verbatim.

51. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper expressly warranted that it was not in violation of any applicable law, regulation or requirement relating to the operation of the Facilities, including applicable environmental laws and regulations.

52. By releasing petroleum and hazardous substances into the ground and groundwater at the Facilities,

Cooper violated applicable environmental laws and regulations.

53. Accordingly, Cooper breached the warranty set forth in the Agreement regarding compliance with applicable environmental laws and regulations. Moreover, although Cooper agreed to notify Aviall about any material variances from the warranties regarding environmental compliance, Cooper has never notified Aviall of regarding its non-compliance. As a result, Aviall has incurred and will continue to incur substantial damages proximately caused as a result of this breach of warranty.

THIRD CLAIM FOR RELIEF AGAINST COOPER
(Contractual Indemnification)

54. Aviall incorporates the averments of Paragraphs 1-53 as if set out verbatim.

55. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper agreed to indemnify Aviall against any loss, liability, damage or expense that Aviall may incur as a result of a breach by Cooper of any representation, warranty, covenant or agreement contained in the Agreement.

56. By refusing to honor its retained environmental liabilities resulting from Cooper's pre-closing activities, and by the other breaches, acts and omissions alleged herein, Cooper breached representations, warranties, covenants and agreements set forth in the Agreement.

57. Accordingly, Cooper is required under the Agreement to indemnify Aviall for all past and future losses, damages and expenses incurred as a proximate result of Cooper's breach of those representations, warranties, covenants and agreements.

FOURTH CLAIM FOR RELIEF AGAINST COOPER
(Declaratory Judgment)

58. Aviall incorporates the averments of Paragraphs 1-57 as if set out verbatim.

59. This claim is for declaratory judgment pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 9613 for the purpose of determining a question of actual controversy between and among the parties.

60. An actual controversy has arisen and now exists between Aviall and Cooper in that Aviall contends and Cooper will deny or will likely deny:

(A) that, as between the parties, responsibility for certain releases or threatened releases of hazardous substances at or from the Facilities has been retained by Cooper; and

(B) that as a result, Cooper is obligated to indemnify Aviall for any sums that it has paid or may be compelled to pay as a result of such release or threatened release of hazardous substances and/or hazardous and solid wastes at or from the Facilities;

(C) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall under CERCLA, SWDA and the Texas Water Code;

(D) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall in

the future under CERCLA, SWDA and the Texas Water Code;

(E) that Aviall is entitled to a declaratory judgment of future liability at the Facilities that will be binding on any subsequent actions to recover response costs incurred at the Facilities in the future.

64. Aviall therefore requests that this Court enter a declaratory judgment declaring that Cooper is liable for all or part of the costs, plus interest, of past, present and future actions taken by Aviall, or any other person or entity, to responses to releases or threatened releases of hazardous substances and solid and hazardous wastes at or proximately caused by conditions that existed before December 10, 1981 in connection with the Facilities for any past or future response costs incurred or damages sustained that arise from activities at the Facilities.

FIFTH CLAIM FOR RELIEF AGAINST COOPER
(Liability under CERCLA)

65. Aviall incorporates the averments of paragraphs 1-64 above as if set forth verbatim.

66. Pursuant to CERCLA, 42 U.S.C. § 9613(f)(1), Aviall is entitled to seek contribution from Cooper, as a person liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), for any response costs and other liability Aviall has incurred or may incur under CERCLA in connection with the Facilities.

67. Aviall is entitled to contribution for all such response costs and other liability on the basis of equitable factors, including, but not limited to:

(A) for over thirty years, Cooper and its predecessors owned and operated the Facilities during which time they managed and controlled waste handling and disposal practices at the Facilities and generated contamination at and from the Facilities;

(B) in contrast to Cooper, Aviall has cooperated with government efforts regarding investigation and cleanup of the Facilities;

(C) if Aviall bore the response costs for which Cooper is directly responsible, Cooper would be unjustly enriched and obtain a windfall at Aviall's expense;

(D) Cooper and Aviall agreed pursuant to the Agreement that Cooper would bear all liabilities as between them for response and remedial action costs arising out of Cooper's pre-closing operation and ownership of the Facilities.

SIXTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas
Solid Waste Disposal Act)

68. Aviall incorporates the averments of Paragraphs 1-67 as if set out verbatim.

69. Pursuant to Tex. Health & Safety Code Ann. Section 361.344(a), as amended, Aviall is entitled to recover

from Cooper the costs of the removal or remedial actions conducted by Aviall in connection with its former Facilities.

70. Such removal and remedial actions were approved by the TNRCC and were reasonable and necessary to address a release or threatened release of a solid waste as defined by the SWDA. Aviall is entitled to apportionment of costs as provided b [sic] the SWDA.

71. Aviall is entitled, pursuant to 28 U.S.C. §§ 2201-2202 and Tex. Civ. Prac. & Relv1. Code Ann. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to Tex. Health & Safety Code Ann. Section 361.344(a) and Tex. Civ. Prac. & Relv1. Code Ann. Section 37.009.

SEVENTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas Water Code)

72. Aviall incorporates the averments of Paragraphs 1-71 as if set out verbatim.

73. Cooper, while owner and operator of the Facilities, placed, used and maintained storage tanks at the Facilities. As a result of its actions, regulated hazardous, toxic or otherwise harmful substances, including without limitation, jet fuel, diesel, gasoline, solid and hazardous waste and hazardous substances, were released, causing or threatening to cause serious groundwater and other contamination. The release and threatened releases present substantial danger to the public health, welfare, or the environment.

74. Cooper failed to take corrective action at the Facilities. Aviall has incurred reasonable and necessary

response costs by taking corrective action in response to releases or threatened releases of hazardous substances and/or hazardous and solid wastes. Aviall will continue to incur such costs in eliminating releases and threatened releases.

75. An actual and judicial controversy exists between the parties concerning liability for costs incurred by Aviall, including attorneys' fees and interest, which Aviall contend are due it from Cooper pursuant to the Texas Water Code § 26.3513, and Aviall seeks contribution against Cooper, as the former owner and operator of the Facilities for the corrective action costs incurred. Pursuant to Texas law, Aviall is entitled to judgment in its favor and against Cooper for contribution, adjudging and deeming that Cooper is liable for the amounts expended by Aviall in response to the releases or threatened releases, plus attorneys' fees, court costs, and interest therein, plus any future costs incurred by Plaintiffs.

EIGHTH CLAIM FOR RELIEF AGAINST COOPER
(Quantum Meruit)

76. Aviall incorporates the averments of Paragraphs 1-75 as if set out verbatim.

77. Aviall has furnished and is furnishing valuable services and materials to Cooper by cleaning up the Facilities, an obligation for which Cooper is partially liable.

78. Theses [sic] services and materials were performed and are performed to the benefit of Cooper and enjoyed by Cooper.

79. Aviall notified Cooper of the services and materials and expected to be paid by Cooper for such services.

80. Accordingly, as an alternative to the other above-mentioned claims, Aviall is entitled to all costs and expenses it has incurred under the theory of quantum meruit.

NINTH CLAIM FOR RELIEF AGAINST COOPER
(Attorneys' Fees)

81. Aviall incorporates the averments of Paragraphs 1-80 as if set out verbatim.

82. Aviall has repeatedly demanded that Cooper comply with the Agreement and pay Aviall for Cooper's share of its response costs incurred to clean up the Facilities.

83. Because Cooper repeatedly refused to honor its commitments, Aviall retained the undersigned counsel to pursue this litigation on its behalf.

84. Aviall has paid or agreed to pay the undersigned counsel reasonable and necessary fees and expenses incurred in connection with this action.

85. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, Tex. Civ. Prac. & Rem. Code Ann. sections 37.009 and 38.002, section 7.02(a) of the Agreement, and Tex. Health & Safety Code Ann. Section 361.344, as well as under the SWDA and the Texas Water Code, to a judgment against Cooper for all attorneys' fees and costs incurred in association with these claims.

WHEREFORE, Aviall prays for the relief requested above, for costs, attorneys' fees, interest as allowed by law and for general relief.

DATED: January 12, 1999.

Respectfully submitted,

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(Certificate of Service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES INCORPORATED	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO. 3-97CV1926-D
	§	
COOPER INDUSTRIES, INC.	§	
	§	
DEFENDANT.	§	
	§	

SECOND AMENDED COMPLAINT

Aviall Services, Incorporated ("Aviall"), for its Second Amended Complaint against Defendant Cooper Industries, Inc. ("Cooper"), alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action, under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended (hereafter "CERCLA"), under the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361 ("SWDA"), and the Texas Water Code § 26.3513, seeking (1) reimbursement of certain investigation and remediation costs incurred by Aviall in response to the release or threat of release of hazardous substances and petroleum hydrocarbons on, under and about the properties known as the Forest Park Facility, Love Field Facility,

Lemmon Terminal Facility and Carter Field Facility (collectively identified herein as the "Facilities"); and (2) declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and 28 U.S.C. § 2201, as to Defendant's liability for further response costs incurred and to be incurred by Aviall at the Facilities.

2. This action is also instituted under the common laws of the State of Texas for breach of contract, breach of warranty and contractual indemnity arising from a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement"), seeking abatement, damages to property value, cost of repair and such other relief as just and proper. An alternative claim in quantum meruit to preclude Cooper from being unjustly enriched by Aviall's remediation activities is also asserted herein.

JURISDICTION AND VENUE

3. This Court has exclusive jurisdiction over the subject matter of this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has federal question jurisdiction under 28 U.S.C. § 1331 for this civil action arising under the laws of the United States. Venue is proper in this District pursuant to Section 113(b), 42 U.S.C. § 9613(b) because the Facilities are located within this District and the release of hazardous substances and petroleum hydrocarbons occurred within this District. The amount in controversy exceeds the amount required for adjudication by this Court.

4. The SWDA, Texas Water Code, breach of contract, breach of warranty, and contractual indemnity and quantum meruit claims are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy under Article III of the United States Constitution. This Court has supplemental jurisdiction

over the SWDA, negligence, negligence per se, gross negligence, trespass, nuisance, public nuisance and breach of contract claims pursuant to 28 U.S.C. § 1367 and the doctrine of pendent jurisdiction.

PARTIES

5. Plaintiff Aviall is a Delaware corporation and has its principal place of business in the State of Texas.

6. Defendant Cooper Industries, Inc., is a [sic] Ohio corporation doing business in the State of Texas. Defendant may be served with citation by delivering a copy of the citation and this Complaint to its registered agent, CT Corporation System, 801 Dallas Avenue, Houston, Texas 77002.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

7. The subject of this action concerns costs, fees and damages arising out of releases and threatened releases of hazardous materials and petroleum hydrocarbons at four facilities known individually as the Forest Park Facility, Love Field Facility, Lemmon Terminal Facility and Carter Field Facility. At those facilities, Cooper and its predecessors conducted aircraft engine overhaul and/or maintenance operations. All four facilities are located either in Dallas, Texas near Love Field Airport or in Fort Worth in the vicinity of the Dallas/Fort Worth International Airport. The factual background for each facility and the conduct of the parties is alleged below.

Forest Park Facility

8. The Forest Park Facility is located at 6114 Forest Park Road, Dallas, Texas. Beginning in the late 1940's, Texas Aircraft & Engine Company ("TA&EC") and Texas Metal & Manufacturing Company ("TM&MC")

conducted engine rebuilding and metal fabricating operations at that location.

9. In 1949, Cooper's predecessor, Aviation Activities Company ("AAC"), acquired TA&EC and TM&MC. On information and belief, AAC merged AAC, TA&EC and TM&MC and formed a new company known as Dallas Airmotive.

10. Dallas Airmotive, also Cooper's predecessor, continued the engine rebuilding and metal fabricating operations at the Forest Park Facility. These operations consisted, in part, of cleaning engines; painting, stripping and plating engine parts; assembling engines; testing engines; maintaining and operating underground storage tanks and tank farms; and using, receiving and storing hazardous materials and petroleum hydrocarbons.

11. During the course of their operations, Cooper's predecessors disposed of and released hazardous materials and petroleum hydrocarbons at the Forest Park Facility. Without limitation, Cooper's predecessors buried drums of waste containing hydrochloric acid; dumped spent trichloroethylene ("TCE") used in their plating operations onto the bare ground; released into the environment TCE used to wash engines located in test cells; allowed petroleum storage tanks to overflow their contents onto the ground; buried silver plating sludges in soils; and corroded drains with acids while releasing into the drains metals, plating solutions and solvents.

Carter Field Facility

12. In 1955, Cooper's predecessor, Southwest Airmotive Company ("Southwest Airmotive"), began aircraft engine maintenance operations at Carter Field located at 15225 F.A.A. Boulevard, Forth Worth, Texas.

13. At the Carter Field Facility, Cooper's predecessor assembled, disassembled and tested aircraft engines and used, received and stored hazardous materials and petroleum hydrocarbons.

14. During the course of such operations, Cooper's predecessor released and disposed of hazardous substances and petroleum hydrocarbons into the environment. Such releases and disposals include, but are not limited to, overfilling of storage tanks with jet fuel, releasing of hazardous substances into drains, and periodic overflowing of an oil/water separator with hazardous materials and petroleum hydrocarbons.

Love Field Facility

15. Beginning in 1931, Cooper's predecessor, Edwin F. Booth, Inc. began piston engine maintenance operations at the Love Field Facility located at 9311 Reeves Street, Dallas, Texas.

16. Southwest Airmotive was subsequently formed from the successor corporation to Edwin F. Booth, Inc., Booth-Herring, Inc. Southwest Airmotive continued aircraft engine overhaul operations at the Love Field Facility and eventually added 3300 Lemmon Avenue, Dallas, Texas to the Love Field Facility.

17. The aircraft engine operations conducted by Cooper's predecessors at Love Field include, but are not limited to, overhauling aircraft engines, which involved cleaning aircraft engines; painting, stripping and plating engine parts; assembling engines; testing engines; refueling of aircraft; maintaining and operating underground storage tanks and tank farms; and using, receiving, and storing hazardous materials and petroleum hydrocarbons.

18. During the course of such operations, Cooper's predecessors overfilled jet fuel storage tanks and disposed of jet fuel onto bare ground, allowed tanks and related piping to leak petroleum hydrocarbons into the surrounding environment, and caused barrels containing chemicals to accumulate and deteriorate on bare ground, leaking their contents into soils and groundwater. Further, Cooper's predecessors overfilled sumps in the plating shop with solvents and plating waste, draining such chemicals into the ground.

Lemmon Terminal Facility

19. The Lemmon Terminal Facility is located at 7511 and 7515 Lemmon Avenue, Dallas, Texas. Beginning in the 1950's, Cooper's predecessor, Southwest Airmotive, conducted aircraft maintenance, fueling and storage at that location.

20. In connection with such operations, Cooper's predecessor overfilled fuel tanks, allowed dripping and spilling of petroleum hydrocarbons onto soils, spilled petroleum hydrocarbons onto the ground in its fueling and weed control activities, and allowed tanks and piping to deteriorate, thereby releasing petroleum hydrocarbons into soils and potentially groundwater. In addition, Cooper's predecessors released non-halogenated solvents into soils.

Cooper's Acquisition of the Forest Park Facility

21. In 1970, Cooper purchased Dallas Airmotive and merged Dallas Airmotive into Cooper. As a result of this merger, Cooper assumed all obligations of and belongings to Dallas Airmotive, including the environmental liabilities relating to the Forest Park Facility.

22. After the merger, Cooper continued operations and purchased additional, adjacent property at the

Forest Park Facility and continued to release and dispose of hazardous materials and petroleum hydrocarbons into the environment.

Pollution at the Forest Park Facility by Cooper and its [sic] Predecessors

23. As a result of the acts and omissions of Cooper and its predecessors, hazardous materials and petroleum hydrocarbons released by Cooper and its predecessors at the Forest Park Facility have been detected in groundwater and soil at the facility including, but not limited to, phase separated hydrocarbons, chlorobenzenes, cis-1,2-dichloroethene (cis-1,2-DCE), perchloroethene, TCE, 1,1-dichloroethene (1,1-DCE), vinyl chloride, and hexavalent chromium. Certain hazardous materials released at the Forest Park Facility by Cooper and its predecessors have migrated through groundwater off of the Forest Park Facility property.

Cooper's Acquisition of the Carter Field, Love Field and Lemmon Terminal Facilities

24. In 1973, Cooper purchased the stock of Southwest Airmotive, Inc. As a result of the stock purchase, Cooper assumed the obligations and liabilities of Southwest Airmotive at the Carter Field, Love Field and Lemmon Terminal Facilities.

Cooper's Pollution of the Carter Field, Love Field and Lemmon Terminal Facilities

25. Further, Cooper continued the operations at the Carter Field, Love Field and Lemmon Terminal Facilities and continued to dispose of and release hazardous materials and petroleum hydrocarbons into the soils and groundwater at the Facilities.

26. As a result of the operations of Cooper and its predecessors at the Carter Field Facility, elevated concentrations of total petroleum hydrocarbons, benzene, toluene, ethylbenzene, and xylenes were identified in soils at the Carter Field Facility. Further, groundwater monitoring wells have identified the on-site presence of 1,1-DCE, vinyl chloride, dissolved-phase hydrocarbons and halogenated solvents at the Carter Field Facility.

27. As a result of the operations of Cooper and its predecessors at the Love Field Facility, unsaturated halocarbons including 1,1-DCE, cis-1,2-DCE, perchloroethene, TCE, petroleum hydrocarbons and vinyl chloride have been detected in soils. Certain unsaturated halocarbons and dissolved-phase hydrocarbons have also been detected in groundwater at the Love Field Facility. Further, four hydrocarbon plumes exist in the soil and groundwater at the Love Field Facility.

28. As a result of the acts and omissions of Cooper and its predecessor at the Lemmon Terminal Facility, gasoline, jet fuel, acetone, and non-halogenated solvent methylethylketone have been detected in soils in and around the on-site sewer catch basins and/or tank farm, among other areas.

29. The contamination caused by Cooper and its predecessors at the Facilities constituted unauthorized discharges prohibited by applicable law, the Texas Water Code Section 26.121 and Fort Worth City Code, Chapter 49 and/or Dallas City Codes, Chapter 7A.

Aviall's Acquisition of the Facilities from Cooper - The Asset Purchase Agreement

30. In 1981, Aviall (through Aviall's predecessor, Aviation Power Supply, Inc.) purchased certain assets of

Cooper, including the operations at the Forest Park, Love Field, Lemmon Terminal and Carter Field Facilities.

31. Aviall and Cooper entered a written Asset Purchase Agreement, dated December 10, 1981 ("Agreement") which set forth the terms and conditions of the sale. Pursuant to the Agreement, Cooper retained all liabilities arising out of pre-closing environmental contamination.

32. Additionally, Cooper represented, in consideration for the Agreement, that Cooper was not in violation of any law, regulation or requirement relating to the Facilities, including without limitation applicable environmental protection laws and regulations. This representation was false. In fact, at the time of closing the Agreement, Cooper was in violation of environmental protection laws and regulations.

33. In consideration for the Agreement, Cooper entered into an "affirmative covenant" that, prior to closing, Cooper would comply with all legal requirements and contractual obligations applicable to the purchased assets. In fact, Cooper did not comply with all legal requirements and contractual obligations prior to the closing date.

34. In the Agreement, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. In fact, Cooper failed to inform Aviall of material variances in environmental compliance from the representations made in Section 4.09(f) of the Agreement.

35. Cooper has refused to honor and follow the Agreement and its obligations under Texas and federal laws by failing to recognize, accept and undertake any environmental responsibilities associated with pre-closing

disposals and releases of hazardous materials and petroleum hydrocarbons at the Facilities.

Aviall's Sales of the Facilities and Standing to Sue

36. In 1995 and 1996, Aviall entered two separate sales through which it sold all of its interests in the Facilities. Under the terms and conditions of such sales, Aviall has retained pre-closing environmental obligations with respect to the Facilities. Accordingly Aviall has standing to prosecute this action.

Aviall's Costs

37. Aviall has cooperated with the State of Texas to investigate and clean up the aforementioned contamination. Thus far, Aviall has incurred over $5,000,000 in costs to respond to, investigate, and remediate contamination at the Facilities. Aviall anticipates that such costs could exceed $21,000,000. Further, Aviall has suffered diminution in value of the Facilities through the 1995 and 1996 sales and the risk of liability to off-site landowners.

38. Aviall has incurred response costs consistent with the National Contingency Plan ("NCP") pursuant to CERCLA and will incur further response costs consistent with the NCP pursuant to CERCLA in the future, as well as costs reimbursable under the laws of the State of Texas.

39. The response, investigation and remediation costs incurred by Aviall were also reasonable, necessary and required by the Texas Natural Resource Conservation Commission ("TNRCC") or its predecessors.

40. A "disposal" and "release" and/or threatened release of "hazardous substances" and or "hazardous waste" has occurred at the Facilities as defined by Sections 101(14), (22), and (29) of CERCLA, 42 U.S.C. §§

9601(14), (22), and (29) of CERCLA and by TEX. HEALTH & SAFETY CODE ANN. Sec. 361.003.

41. Cooper is a person who is a responsible party under Section 107(a), 42 U.S.C. § 9607(a), of CERCLA as a past owner and operator of the Facilities at the time of disposal of hazardous substances and as an arranger for disposal of hazardous substances at the Facilities.

42. Forest Park, Love Field and Carter Field each constitute a "facility" as required by Section 107(a), 42 U.S.C. § 9607(a), of CERCLA. Hazardous substances have come to be located at the Facilities.

43. Aviall has incurred recoverable response costs in responding to the contamination at the Facilities that are consistent with the NCP, 40 C.F.R. Part 300.

FIRST CLAIM FOR RELIEF AGAINST COOPER
(Breach of Contract by Cooper)

44. Aviall incorporates the averments of Paragraphs 1-43 as if set out verbatim.

45. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper retained all risk of costs, damages and liabilities arising out of pre-closing disposals of hazardous materials and contamination.

46. Cooper agreed to retain all liabilities or obligations (i) not expressly assumed by Aviall under the Agreement, (ii) those liabilities and obligations covered by Cooper's insurance, and/or (iii) all liabilities or obligations constituting a violation of federal, state or local law or requirement of any governmental authority. Additionally, in the Agreement, Cooper falsely represented that it was not in violation of any law, regulation or requirement relating to the Facilities, including, without limitation, applicable

environmental protection laws and regulations. Moreover, Cooper agreed to promptly inform Aviall in writing of all material variances from the representations and warranties contained in Article 4 of the Agreement. Notwithstanding this Agreement, Cooper entirely failed to inform Aviall of the material variances from its representations and warranties of environmental compliance.

47. Aviall has incurred costs and liabilities related to Cooper's violation of applicable law and governmental authorities' requirements governing Cooper's acts at the Facilities. Such costs and liabilities arise out of Cooper's acts and omissions resulting in the contamination of soils and groundwater at the Facilities. Moreover, Aviall itself never agreed to assume such costs and liabilities under the Agreement.

48. Aviall has requested that Cooper undertake its obligations and liabilities under the Agreement. Cooper has breached its duties under the Agreement by refusing to assume and satisfy such obligations and liabilities. Moreover, by refusing to honor its obligations, Cooper has engaged in an anticipatory breach of the Agreement, thereby entitling Aviall to recover damages for costs to be incurred in the future as a proximate result of Cooper's anticipatory breach.

49. Aviall has incurred and continues to incur substantial damages proximately caused as a result of Cooper's breaches of the Agreement. In reasonable probability, Aviall will incur substantial damages in the future as a result of Cooper's anticipatory breach of the Agreement.

SECOND CLAIM FOR RELIEF AGAINST COOPER
(Breach of Warranty)

50. Aviall incorporates the averments of paragraphs 1-49 as if set out verbatim.

51. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper expressly warranted that it was not in violation of any applicable law, regulation or requirement relating to the operation of the Facilities, including applicable environmental laws and regulations.

52. By releasing petroleum and hazardous substances into the ground and groundwater at the Facilities, Cooper violated applicable environmental laws and regulations.

53. Accordingly, Cooper breached the warranty set forth in the Agreement regarding compliance with applicable environmental laws and regulations. Moreover, although Cooper agreed to notify Aviall about any material variances from the warranties regarding environmental compliance, Cooper has never notified Aviall of regarding its non-compliance. As a result, Aviall has incurred and will continue to incur substantial damages proximately caused as a result of this breach of warranty.

THIRD CLAIM FOR RELIEF AGAINST COOPER
(Contractual Indemnification)

54. Aviall incorporates the averments of Paragraphs 1-53 as if set out verbatim.

55. As between Aviall and Cooper, under the December 10, 1981 Agreement, Cooper agreed to indemnify Aviall against any loss, liability, damage or expense that Aviall may incur as a result of a breach by Cooper of any

representation, warranty, covenant or agreement contained in the Agreement.

56. By refusing to honor its retained environmental liabilities resulting from Cooper's pre-closing activities, and by the other breaches, acts and omissions alleged herein, Cooper breached representations, warranties, covenants and agreements set forth in the Agreement.

57. Accordingly, Cooper is required under the Agreement to indemnify Aviall for all past and future losses, damages and expenses incurred as a proximate result of Cooper's breach of those representations, warranties, covenants and agreements.

FOURTH CLAIM FOR RELIEF AGAINST COOPER
(Declaratory Judgment)

58. Aviall incorporates the averments of Paragraphs 1-57 as if set out verbatim.

59. This claim is for declaratory judgment pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 9613 for the purpose of determining a question of actual controversy between and among the parties.

60. An actual controversy has arisen and now exists between Aviall and Cooper in that Aviall contends and Cooper will deny or will likely deny:

(A) that, as between the parties, responsibility for certain releases or threatened releases of hazardous substances at or from the Facilities has been retained by Cooper; and

(B) that as a result, Cooper is obligated to indemnify Aviall for any sums that it has paid or may be compelled to pay as a result of such

release or threatened release of hazardous substances and/or hazardous and solid wastes at or from the Facilities;

(C) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall under CERCLA, SWDA and the Texas Water Code;

(D) that Cooper is liable for certain response costs incurred by Aviall, or damages sustained by Aviall in the future under CERCLA, SWDA and the Texas Water Code;

(E) that Aviall is entitled to a declaratory judgment of future liability at the Facilities that will be binding on any subsequent actions to recover response costs incurred at the Facilities in the future.

61. Aviall therefore requests that this Court enter a declaratory judgment declaring that Cooper is liable for all or part of the costs, plus interest, of past, present and future actions taken by Aviall, or any other person or entity, to responses to releases or threatened releases of hazardous substances and solid and hazardous wastes at or proximately caused by conditions that existed before December 10, 1981 in connection with the Facilities for any past or future response costs incurred or damages sustained that arise from activities at the Facilities.

FIFTH CLAIM FOR RELIEF AGAINST COOPER
(Liability under CERCLA)

62. Aviall incorporates the averments of paragraphs 1-61 above as if set forth verbatim.

63. Pursuant to CERCLA, 42 U.S.C. § 9613(f)(1), Aviall is entitled to seek contribution from Cooper, as a person liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), for any response costs and other liability Aviall has incurred or may incur under CERCLA in connection with the Facilities.

64. Aviall is entitled to contribution for all such response costs and other liability on the basis of equitable factors, including, but not limited to:

(A) for over thirty years, Cooper and its predecessors owned and operated the Facilities during which time they managed and controlled waste handling and disposal practices at the Facilities and generated contamination at and from the Facilities;

(B) in contrast to Cooper, Aviall has cooperated with government efforts regarding investigation and cleanup of the Facilities;

(C) if Aviall bore the response costs for which Cooper is directly responsible, Cooper would be unjustly enriched and obtain a windfall at Aviall's expense;

(D) Cooper and Aviall agreed pursuant to the Agreement that Cooper would bear all liabilities as between them for response and remedial action costs arising out of Cooper's pre-closing operation and ownership of the Facilities.

65. Both the Attorney General of the United States and the Administrator of the environmental [sic] Protection Agency have been notified of the action and

provided with a copy of the Original Complaint and First Amended Complaint.

SIXTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas Solid Waste Disposal Act)

66. Aviall incorporates the averments of Paragraphs 1-66 as if set out verbatim.

67. Pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a), as amended, Aviall is entitled to recover from Cooper the costs of the removal or remedial actions conducted by Aviall in connection with its former Facilities.

68. Such removal and remedial actions were approved by the TNRCC and were reasonable and necessary to address a release or threatened release of a solid waste as defined by the SWDA. Aviall is entitled to apportionment of costs as provided b [sic] the SWDA.

69. Aviall is entitled, pursuant to 28 U.S.C. §§ 2201-2202 and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.004, to a declaratory judgment as to Cooper's liability for response and remedial action costs and other liabilities in connection with the Facilities, along with related relief as is requested herein. Also, Aviall seeks recovery of costs and reasonable and necessary attorney's fees pursuant to TEX. HEALTH & SAFETY CODE ANN. Section 361.344(a) and TEX. CIV. PRAC. & REM. CODE ANN. Section 37.009.

SEVENTH CLAIM FOR RELIEF AGAINST COOPER
(Contribution Under the Texas Water Code)

70. Aviall incorporates the averments of Paragraphs 1-71 as if set out verbatim.

71. Cooper, while owner and operator of the Facilities, placed, used and maintained storage tanks at the Facilities. As a result of its actions, regulated hazardous, toxic or otherwise harmful substances, including without limitation, jet fuel, diesel, gasoline, solid and hazardous waste and hazardous substances, were released, causing or threatening to cause serious groundwater and other contamination. The release and threatened releases present substantial danger to the public health, welfare, or the environment.

72. Cooper failed to take corrective action at the Facilities. Aviall has incurred reasonable and necessary response costs by taking corrective action in response to releases or threatened releases of hazardous substances and/or hazardous and solid wastes. Aviall will continue to incur such costs in eliminating releases and threatened releases.

73. An actual and judicial controversy exists between the parties concerning liability for costs incurred by Aviall, including attorneys' fees and interest, which Aviall contend are due it from Cooper pursuant to the Texas Water Code § 26.3513, and Aviall seeks contribution against Cooper, as the former owner and operator of the Facilities for the corrective action costs incurred. Pursuant to Texas law, Aviall is entitled to judgment in its favor and against Cooper for contribution, adjudging and deeming that Cooper is liable for the amounts expended by Aviall in response to the releases or threatened releases, plus attorneys' fees, court costs, and interest therein, plus any future costs incurred by Plaintiffs.

EIGHTH CLAIM FOR RELIEF AGAINST COOPER
(Quantum Meruit)

74. Aviall incorporates the averments of Paragraphs 1-73 as if set out verbatim.

75. Aviall has furnished and is furnishing valuable services and materials to Cooper by cleaning up the Facilities, an obligation for which Cooper is partially liable.

76. Theses [sic] services and materials were performed and are performed to the benefit of Cooper and enjoyed by Cooper.

77. Aviall notified Cooper of the services and materials and expected to be paid by Cooper for such services.

78. Accordingly, as an alternative to the other above-mentioned claims, Aviall is entitled to all costs and expenses it has incurred under the theory of quantum meruit.

NINTH CLAIM FOR RELIEF AGAINST COOPER
(Attorneys' Fees)

79. Aviall incorporates the averments of Paragraphs 1-78 as if set out verbatim.

80. Aviall has repeatedly demanded that Cooper comply with the Agreement and pay Aviall for Cooper's share of its response costs incurred to clean up the Facilities.

81. Because Cooper repeatedly refused to honor its commitments, Aviall retained the undersigned counsel to pursue this litigation on its behalf.

82. Aviall has paid or agreed to pay the undersigned counsel reasonable and necessary fees and expenses incurred in connection with this action.

83. Aviall is entitled, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2), 28 U.S.C. §§ 2201-2202, TEX. CIV. PRAC. & REM. CODE ANN. sections 37.009 and 38.002, section 7.02(a) of the Agreement, and TEX. HEALTH & SAFETY CODE ANN. Section 361.344, as well as under the SWDA and the Texas Water Code, to a judgment against Cooper for all attorneys' fees and costs incurred in association with these claims.

WHEREFORE, Aviall prays for the relief requested above, for costs, attorneys' fees, interest as allowed by law and for general relief.

DATED: June __, 1999.

Respectfully submitted,

/s/_____
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AVIALL SERVICES, INCORPORATED	)	CIVIL ACTION NUMBER
	)	3:97-CV-1926-D
VERSUS	)	
	)	January 5, 2000
COOPER INDUSTRIES, INC.	)	

TRANSCRIPT OF ORAL
ARGUMENT BEFORE THE
HONORABLE SIDNEY A. FITZWATER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff;	DALE E. STEPHENSON SQUIRE, SANDERS & DEMPSEY, L.L.P. 6250 Texas Commerce Tower 600 Travis Street Houston, Texas 77002 713/546-5858
For the Defendant:	RICHARD O. FAULK and JOSE BERLANGE GARDERE WYNNE SEWELL & RIGGS, L.L.P. 1000 Louisiana, #3400 Houston, Texas 77002-5007 713/276-5651
Court Reporter:	PAMELA J. WILSON, CSR 1100 Commerce Room 15A3 214/415-1884

PROCEEDINGS

THE LAW CLERK: All rise.

The United States District Court for the Northern District of Texas is now in session, the Honorable Judge Sidney A. Fitzwater presiding.

Let us pray. God save the United States and this Honorable Court.

THE COURT: Be seated, please.

This is Aviall Services versus Cooper Industries.

We'll begin with Mr. Stephenson.

MR. STEPHENSON: May it please the court. Plaintiff Aviall and defendant Cooper Industries, Inc. have filed cross motions for summary judgment addressing many of the same issues. Aviall seeks partial summary judgment only with respect to five of the nine claims asserted in the first amended complaint: Breach of contract based on alleged retaining liabilities; contractual indemnification under the written contract; contribution under Section 113 of the Comprehensive Environmental Response Compensation and Liability Act; and contribution under state law claims for the Texas Solid Waste Disposal Act and the Texas Water Code. The statutory environmental claims are all based on strict liability provisions. Aviall does not seek summary judgment with respect to the other four causes of action asserted in its amended complaint: Breach of warrant, declaratory

judgment, quantum meruit and attorneys fees.

In constrast, Cooper seeks summary judgment on its favor in all the claims asserted in the amended complaint.

THE COURT: Mr. Stephenson, what's the basis for the subject matter jurisdiction of the court in this case?

MR. STEPHENSON: Subject matter jurisdiction arises under the Comprehensive Environmental Response Compensation and Liability Act, Section 113.

THE COURT: All right. So it's federal question jurisdiction?

MR. STEPHENSON: That's correct.

THE COURT: And if you are correct that there is not a viable CERCLA claim, does the court have discretion to dismiss the balance of the case without prejudice?

MR. STEPHENSON: Absolutely, under UMW V. Gibbs, I believe.

THE COURT: And what do you understand the declaratory judgment claim of the plaintiff to be?

MR. STEPHENSON: The declaratory judgment claim is for future costs to be expended at the property. It's based on a provision in Section 113(g) of CERCLA which relates solely to private party direct causes of action under Section 107. Since their remaining claim is under Section 113 and there is no parallel provision for declaratory judgment under CERCLA, that section is inapposite.

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THE COURT: Now, when you say there is no declaratory judgment provision under CERCLA, as I read that provision there is a remedy of declaratory judgment that's available, but you contend that that is tied to a 107 claim; is that correct?

MR. STEPHENSON: It is a section that relates solely to direct causes of action under Section 107(a). Immediately following -- it is limited to this subsection. Immediately following the subsection which refers to statutory of limitations and other things for contribution actions under Section 113(f) does not have an equivalent provision.

THE COURT: What do you understand this combined 107/113 claim to be that Aviall brings?

MR. STEPHENSON: The combined -- I don't think there -- there is a -- is a combined claim. I think the law is well established that to pursue a direct cause of action under Section 107 you have to be either an innocent party or the United States Government, and we don't have that -- or an innocent -- or an innocent party, and we don't have that in this case. In fact, Aviall dropped its Section 107 complaint in the original complaint. It was originally count 1 of the complaint.

THE COURT: Aviall continues to refer to 107 in connection with the 113 claim. I used the word "combined,"

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another way might be hybrid or something else.

MR. STEPHENSON: Sure. I think that under the cases cited that you have to have a threshold activity that gets a party to assert a contribution claim: That is, you have to have either an enforcement action against a party for their own direct liability for which they can then seek contribution; you can have an administrative enforcement action by the United States; you can have a lawsuit by another party, an innocent, private party that -- pursuing an act under 107, and then the defendant in that action can have a right to contribution under Section 113. None of those circumstances exist in the present case. This is solely a private party taking action on its own property and seeking to manufacture the CERCLA claim.

THE COURT: Okay.

MR. STEPHENSON: Thank you.

Aviall doesn't dispute at all that it polluted these properties, and that's why it can't have its own direct private party claim as an innocent party.

18 years ago Aviall purchased the properties and knew exactly what it was purchasing. It was an industrial property of 50 underground storage tanks, industrial operations for plating, handling solvents and other materials. Indeed the president of Cooper went over to become the president of Aviall on the purchase. They knew

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exactly what they were purchasing and operating. As the environmental laws emerged over time, particularly with respect to underground storage tanks in the late 1980s, some seven or eight years after the purchase, Aviall systematically, methodically removed underground storage tanks, cleaned up contaminated soil from the leaks in the aging tanks during its watch and incurred those costs in the ordinary course of business.

The comprehensive written contracts negotiated between the two parties in this case are really the heart of the issue. Indeed, Aviall agrees that this is primarily a contract case, and so we'll focus on those issues initially. The contracts may be complex but they aren't ambiguous. Aviall argues that Cooper is trying to avoid its legal obligations, but the thrust of Aviall's argument makes clear that it's trying to rewrite the terms of the agreements.

THE COURT: Let me turn if I might to Section 103.(b), Roman Numeral X.

MR. STEPHENSON: Yes.

THE COURT: You've made an argument in your brief where you attempt to draw a distinction between retained versus not assumed. And I think you criticized Cooper's brief – Aviall's brief, excuse me, for repeatedly referring to retained liabilities when you contend the word retained is not in the agreement.

Would you explain to me what you mean by that distinction? Because the other side of that is if you don't assume it, the other party kept it.

MR. STEPHENSON: What Cooper kept was obligations for a specific period of time under the indemnity provision of the agreement. Anything that was not an assumed liability falls over to be handled under Section 7.02 of the purchase agreement. And matters which were other than assumed liabilities had a five year from the time -- date of closing window in which to assert a claim. That would have expired in 1986. It went away along before Cooper -- Aviall ever contacted Cooper a decade later.

So what I mean is that retained -- retained only has the concept of the indemnity that is woven into the agreement. It doesn't have a standalone implied breach of contract connotation that swallows the carefully crafted terms for recovery.

THE COURT: And you would say that the obligation to indemnify is the same; is that right?

Because they attempt to distinguish between an obligation to indemnify and a retained liability as I understand it.

MR. STEPHENSON: That's correct. Well, it's one of two things. If the claim comes under section -- subsection (x) that you're referring to, that's an other

than assumed liability. Those -- those had an express five year window for bringing a claim for that. If it's something other than -- other than those enumerated things in subsection B, then the comprehensive release that the parties negotiated in 1982, October of 1982, was a complete release and forgiveness of all agreements or other terms in the contract. So it's one or the other.

THE COURT: And they say there is language in the release that says you acknowledge and will continue to honor liabilities that you retain.

MR. STEPHENSON: And the second sentence of the release says "subject to the applicable time limits." I mean, it's express in the release that anything that is left under the non-assumed liabilities is subject to the applicable time limits, in this -- in this context five years.

This court recently took a look at the vendor property obligations in a slightly different context. It involved leaking underground storage tanks in the Owens versus the Estate of Irwin matter. In recognizing the general rules, a grantor of real property isn't liable for dangerous or defective conditions on land once the grantee has taken possession of the property, unless the grantor knew of dangerous conditions at the time of the transfer or acted to conceal or failed to disclose it. We don't have that

circumstance in this case. There is no allegation of misrepresentation. There is no allegation of fraud. A similar result was reached in Jones versus Texaco in the Southern

District of Texas in 1996, 945 F. Sup 1037 and Hicks versus Humble Oil in the Texas appellate court, 970 S.W.2d 90.

The analogy here is Aviall bought property with specific contract rights for recovery if something went wrong for one year or for five years or was released. If Aviall in doing construction on its property discovered a pot of gold on the property, I don't think they would be giving it back to Cooper because it was a windfall to them. Likewise, if a homeowner buys a house and later the roof leaks, it doesn't undo the deal.

The real question here: Does the contract unwind the general rule that a person buys what they get?

We think it is clear that application of the contract on its face requires -- means that there is no -- no contractual recovery for Aviall.

THE COURT: Let me jump back to something you just said, the general rule that somebody gets what they buy.

MR. STEPHENSON: Correct.

THE COURT: Their argument though under Texas corporate law is that a successor corporation doesn't assume certain liabilities; so is that analogy really correct?

MR. STEPHENSON: I think it is, because the liability that they got was the property that they bought.

Their liability under CERCLA arises not only because they contaminated the property themselves but because they owned it. CERCLA is a strict liability statute that creates liabilities for owners. And they got that as part of the evolving time period.

There hasn't been a CERCLA claim brought against Cooper in this case. There hasn't been a CERCLA claim brought against Aviall in this case. They simply did something with their own property. They got what they got. They fixed it up over time. They complied with emerging rules for underground storage tanks and other things. And finally they sold their properties in 1995/'96. And the only reason they're continuing to do anything with those properties is because they contractually agreed with the buyers to do that. They cut the deal, and now they're trying to make somebody else pay for any cost differences that they encountered. They did this work normally and systematically for more than a decade before they ever contacted Cooper. It was the ordinary course of business as far as they were concerned.

We note in the briefs there is a single environmental provision in the contract which relates to the representation for compliance with environmental safety laws

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and regulations, and that expired under the one year statute of limitations in Section 7.02(a) of the contract.

THE COURT: And they say that they're not suing you based on that provision.

MR. STEPHENSON: Well, the complaint on its face alleges that.

THE COURT: I'm trying to remember which brief it was I read, but in one of the briefs they say --

MR. STEPHENSON: They say they no longer believe we misrepresented that in the summary judgment brief, that's correct.

THE COURT: And I think the reason they do that is to bolster the argument that the time limits don't apply.

MR. STEPHENSON: That's certainly true.

But the key time limit, here again, is the other than assumed liability five year time limit.

Coupling that with the release, "All representations, warrants, covenants, agreements --- "

THE COURT: Slow down a little when you read for the reporter.

MR. STEPHENSON: Yeah. "-- contained in the asset agreement are deemed to be fully satisfied forever. Aviall releases Cooper from any and all allegations or claims to indemnify Aviall for any breach of any representation, warranty, covenant or agreement of Cooper contained in or

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related to the asset agreement."

Even if the express term limits in the contract did not apply, the general statute of limitations would be four years in the State of Texas, triggering from the time the injury was caused to the property, again, expiring in 1985. We raised in the brief also the issue of the express strict liability doctrine in the State of Texas applicable to these. We do need to advise the court that yesterday the Fifth Circuit reversed the decision in Fina versus Arco.

THE COURT: Yeah, I saw that. That was Judge Wiener, I think.

MR. STEPHENSON: That's correct. That's correct. Aviall had argued that here the contract did not specifically mention CERCLA liability nor under the authorities must it do so, citing Fina versus Arco. The Fifth Circuit reversed, holding that general contractual language in two purchase agreements did not cover strict liability under CERCLA pursuant to, one contract, Delaware's clear and unequivocal standard, and in the other contract, Texas's more stringent express strict liability standard. That follows the Houston Lighting and Power decision from the Texas Supreme Court in 1994, refusing to enforce a strict liability claim on indemnity provision expressly -that expressly covered negligence claims.

THE COURT: Let me go back to CERCLA for a minute.

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You make the argument that the failure to give notice deprived the court -- and deprives the court of subject matter jurisdiction.

MR. STEPHENSON: Right.

THE COURT: Would you explain the basis for that argument and address whether those subject matter jurisdiction cases are distinguishable because they deal with different types of statutes?

MR. STEPHENSON: They are certainly -- the holdings are different in that they are citizen suit provisions under the Clean Water Act, the Clean Air Act, and other statutes that allow a private party to stand in as a private Attorney General. But the exact provision that we're talking about here in Section 113(1) of CERCLA is incorporated into the citizen suit provision of CERCLA in Section 310 and it is held to be a concurrent requirement by USEPA.

Here, in the CERCLA context, the agency and the Attorney General responsible for overseeing this statute didn't know about the claims being made here for 21 months, until it was brought to their attention after we brought it to Aviall's attention. Similarly, the lack of public participation on the site kept all of the public shielded from what was going on here.

My guess is that the United States, administrator of

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EPA, and the Attorney General don't know that there is a second amended complaint in this case alleging that notice 21 months late is okay. I haven't seen any indication that Aviall has served that complaint on the United States.

The idea behind provisions like this is to give the government a chance to do something. The only case that Aviall cited with respect to this was a -- where individual plaintiffs brought a claim in the Green matter in Kansas. And in that case, the court allowed -- or directed the parties to go back and depose EPA -- an EPA official to see if they cared about the site or not. That was the relief granted in that case.

Here you can look at analogous statutes that aren't citizen suit provisions. We looked at one maritime --

THE CLERK: Three minutes.

MR. STEPHENSON: Thank you.

We looked at one maritime matter where less than 120 days was found to be too long.

And I would like to reserve the remaining 10 minutes, r if you had a follow-up question

THE COURT: You may reserve up to ten minutes under the court's order.

MR. STEPHENSON: Thank you.

THE COURT: All right. Thank you. Mr. Faulk.

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MR. FAULK: Thank you, Your Honor.

If the court please, I -- it appears the court is familiar with the contract provisions, but we've prepared a short excerpt of contract highlighted sections that we would like to tender to the court.

Your Honor, I -- I think as has during the course of the questioning of this contract are things that are of the case. And we believe that it redundant perhaps, to look at the specific interpretation that Aviall places on these contract provisions and then show how those contract provisions support the positions we have taken.

Clearly in Section 1.03(b), Aviall did not assume certain responsibilities under the contract. And there were three different types of liabilities that weren't assumed under that particular type of -- part of the contract. And the catchall one is, as the court properly noted, Section which states that we're not responsible for any liability of the seller unless it is expressly assumed by the buyer.

There is also a provision, Section 4, that deals with liabilities of the seller arising as a result of preclosing conduct and also with respect to insured liabilities under Section 3 of the contract.

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The interesting thing about those obligations, we believe that there's no other place in the contract where environmental liabilities are discussed with any particularity at all. And the only place that that in fact does come in, arguably from Mr. Stephenson's client, is in the phrase "ordinary course of business" under the assumed liabilities section, Section 1.03(a).

For several good reasons, Your Honor, the question of ordinary course of business does not apply in this situation. The most critical point is Section 4.05(c) of the contract, in which the parties define what ordinary course of business is. And in that provision, ordinary course of business specifically excludes breach of contract claims, torts, claims or lawsuits, or such extraordinary liabilities as you would find under that particular definition. So the contract itself says that this is not the sort of thing -- a liability arising in the ordinary course of business.

The ordinary course of business *distinction* also covers -- only deals with balance sheet liabilities, as the contract specifically says. And no such nondisclosed and at the time nonexisting environmental liability such as this would ever be disclosed on a balance sheet as the parties anticipated.

Now, the contracts definition excluding extraordinary

liabilities is very consistent with the Mudgett case and the Tuscarosa cases from Texas which specifically hold that torts, for example, are not things that are in the ordinary course of business under these sorts of situations. Even getting down to a dictionary definition, the transaction of business seems to be the focus here, and this sort of waste disposal activity doesn't really apply as a transaction of business with third parties or a profit-generating activity which would be subject to it. So we submit for those reasons that environmental liabilities are not specifically allocated in this contract.

Therefore, we have to construe the contract according to what Aviall and the parties intended. And they intended that Aviall assume only those liabilities which were expressly assumed, and that was clearly not.

The court asked a question about whether or not retaining the liabilities means the same thing as not assuming them. Let me point out that the release that they executed, as the court noted, definitely says that Cooper continues to acknowledge its obligations under those provisions for liabilities not assumed by Aviall. And the course of dealing between the parties, for five separate times after this contract was executed, when Aviall tendered environmental claims to Cooper, they accepted those using the words that these are retained liabilities which were not

assumed by Cooper. So it's not a word or a play on words, Your Honor, that this is something we have conjured up here. We're using words that were first used by Cooper both in the release and in the correspondence regarding these other environmental claims that came up.

If I may, Your Honor, let me talk about the indemnity provision specifically. There has been some discussion by Mr. Stephenson that the claim made in the indemnity language here is a claim that is regulated by either a one or a five year plan.

In the handout that I have given you, on the 21st page is the section involving indemnity. And our claim is not based, Your Honor, on either of the provisions that are regulated by those time periods.

Our claim is based -- under indemnity is based under 7.02(a), and there is a small subsection 2 in that section which says we can sue them, "as a result of the breach by seller of any representation, warranty, covenant or agreement contained in this agreement."

We're not suing them under little Section 1, which as the court will see below in 17.02(b)(a)(1) provides a one year limitations period contractually, and in Section (c), Section (a)(3) provides a five year statute. But under Section 2 there is no contractual time limitation stated in the contract.

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Now, I've done some thinking about this to the point of saying where do the parties' minds meet here. Is there a way to say why that particular provision doesn't have a specific limitation. And the answer is very lucid, and it's down in Section 7.02(e). And if the court will take a look at that, the court will see that in that provision, with the exception of Section 5 of the contract, which doesn't apply in this situation, that Aviall is obliged to indemnify Cooper for the same conduct, the same language. I t is a mirror image of the provision in Section 2 above, and there is no time limitation set on that.

What does that mean?

To me, Your Honor, I think it's reasonable to say that under those circumstances that indicates that with respect to claims that were unknown at the time of closing, with respect to actions that might arise in the future as a result of pre-closing conduct, that the parties did not intend to be bound by contractual time limitations on that particular type of

activity. And to me that is one of the clearest -- that mirror image is one of the clearest examples of the parties having equal rights to come back and assert actions notwithstanding the passage of these one and five year limitations.

THE COURT: Let me jump over for a moment to the four year statute of limitations under Texas law and ask

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that you address Cooper's argument.

MR. FAULK: Well, Cooper's argument is based upon the fact that according to them Aviall incurred a legal injury at the time the injury occurred or at the time the contamination was occurring or in fact discovered. That is the general rule, Your Honor, under tort law, and I'm not going to argue with that. But for a breach of contract claim, the Texas law, number one, says that a cause of action occurs on breach of the contract.

And the cases from Texas, the Permian case, as well as the Fifth Circuit case that we have cited say that when you're dealing with a contract the cause of action does not accrue upon the time that you sustain damage, it doesn't accrue when you first suffer a loss or when you first suffer some sort of contamination; it occurs upon presentment of the claim for enforcement of the contract and upon refusal of the other side to perform.

And within those parameters, we made these presentations to Cooper well within the four year period prior

to the time this lawsuit was filed, by letters in 1995, in 1996. They clearly refused in 1996. This lawsuit was filed in 1997.

THE COURT: Well, they, as I understand it, at least advance three arguments in that connection: One is they distinguish these cases that you rely on; two, they

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characterize your argument as somewhat circular; and three, I think they call it bootstrapping. And when they say you could let these claims go on for eternity, you say, well, no, there's no eternity because there's a limit of four years under the Texas statute.

Now, why isn't there a potential for eternity in that you just let the claims become stale, relevant witnesses die, and then decide at some future point that you will make the demand?

I mean, under your argument aren't you allowed to stretch this out for many years before you make a demand?

MR. FAULK: Your Honor, I certainly do contend that we are allowed to do that.

Before I get directly to the court's question though, let me point out that this eternity argument is not a problem that gave Cooper any pause with respect to environmental liabilities five separate times other than this. There were claims made against Cooper five times prior to the -- to us standing here, once after the time period where the lawsuit here had been filed, and no limitations arguments, no contractual defense arguments, none of those things were

raised by Cooper in that course of dealing and contract, which seems to be the best evidence of how Cooper construes it.

Let me answer the question directly. Your Honor, if

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the-law legally permits the cause of action to accrue upon the presentment of the claim and its declination, it's no different and no more unfair, for example, than making the long-awaited claims that are made against insurance companies for these sort of pollution issues for coverage in other situations. It is not uncommon in environmental liabilities for persons not to discover these sorts of events, and to discover the proper party's culpability until many years thereafter. It is no more unfair to Cooper than it is to hold an insurer responsible and to say that the cause of action you're denied under coverage accrues at such time as the insurer actually denies them.

THE COURT: Let me jump over if I might to CERCLA for a minute, so I make certain I get some questions out, and then I'll get you go back to these arguments, if you would like.

MR. FAULK: Excellent.

THE COURT: First of all, would you address the issue of the court's subject matter jurisdiction. Is this a federal question case where the state claims are supplemental as opposed to diversity of the citizen --

MR. FAULK: It is. It is a federal question issue.

THE COURT: Okay. All right. And what is the nature of your declaratory judgment action as it relates to

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federal claims? I know a component of it is state liability.

Is it a 2201 general garden variety declaratory judgment action?

MR. FAULK: It is, Your Honor, to the extent that it mirrors the relief that we're entitled to under Section 107, which is essentially a finding -- and 113, which is essentially a finding and declaration of Cooper's responsibility as a responsibility part -- party under CERCLA, and -- which is necessary for a finding of contribution. So it is in a sense a mirrored claim of the claim under 107/113.

THE COURT: And then that leads to the question of what is the nature of your claim. I've been calling it a hybrid or a combined claim. Explain what the claim is.

MR. FAULK: The Supreme Court in the King (phonetic) case referred to it as a blended remedy. The claim that we are asserting is a claim under Section 113(f) for recovery of contribution for costs against parties that we can recover from under Section 107.

Section 107, according to the Centurior case out of the Sixth Circuit and the Sun Company case out of the Tenth Circuit, Section 107 is a part of a Section 113 contribution action for that purpose.

The only difference between a cause of action like

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ours, which is brought by one party against another, one PRP against another, and a direct 107 action brought by the government, is that the only relief that we can obtain is a several judgment for that portion of Cooper's responsibility that we have been able to bring forward. That is the cause of action. It is a cause of action that expressly under CERCLA can be brought in the absence of any other civil action.

I refer to it in the brief, Your Honor,. as an initial action for contribution. It is an action by a PRP who has cleaned up, without the necessity of environmental enforcement action prompting it through an order or through judgment and who now has obtained -- obtained a cost and now seeks contribution against another party who is responsible. In that situation both parties are jointly and severally liable and being jointly and severally liable, they are responsibility for contribution according to Section 113.

The Centurior case, Your Honor, is the case of the Sixth Circuit that makes this point I think most eloquently, and the case also specifically holds that some sort of prior action by the government is not required, some sort of prior judgment in a civil action is not required as a prerequisite to this. The case very specifically holds that the only difference is that our recovery is several.

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THE COURT: Do you then concede that you do not have at this time a standalone Section 107 claim?

MR. FAULK: I don't think I would concede it quite that way. I would say we have a 113 claim that is based upon its incorporation of the remedies and rights under 107 according to what the statute provides. I'm hesitant to say that, although I don't think I could maintain a 107 claim standing alone, nor have we ever tried to.

THE COURT: Well, what was the claim that you dropped?

MR. FAULK: Mr. Stephenson has referred to it as a moving target. I apologize it appears that way. We have dropped no claims. The complaint itself very specifically says in its opening paragraph that this is a lawsuit under Section 107 and 113, which, in fact, it is, Your Honor, because you can't discuss 113 in this context without discussing 107, because, as the cases say, 107 is a part of 113 for purposes of causes of action like this.

THE COURT: But in your original complaint there was a claim that does not -- is not phrased the way you currently phrase your complaint. What type of claim did you think it was when you brought it? A 107 claim?

MR. FAULK: I'll be honest with you, Your Honor, I wasn't involved in the case when the original complaint was drafted.

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THE COURT: I didn't mean you personally, I meant you --

MR. FAULK: I do believe that were trying to seek the umbrella relief from -- for -- under both Sections of the provision as they complemented each other. If that was in artfully phrased, that was certainly the intent, was to make sure that Cooper could be shown to be a responsible party under 107 so that we could then obtain contribution under Section 113.

THE COURT: Okay. Let me ask it another way then. You're a very careful lawyer.

If I were to have allowed you to amend again, why would you not, you meaning your client, bring a 107 claim? Without 113.

MR. FAULK: I would not do it because I do not think that -- I think the remedy that the law authorizes here is a 107 claim -- a 113 claim in the -- in the format that we have raised it in our current pleadings.

THE COURT: Is it because you're a PRP?

MR. FAULK: It would be, I believe. I would believe that. It wouldn't bar it, however, for purposes of contribution.

THE COURT: I'm not to that point.

MR. FAULK: Okay.

THE COURT: I am really just trying to understand

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standards.

You asked if there's prejudice in the late notice. Yes, there is prejudice. We pointed it out in our statute of limitations argument: The witnesses have gone away; the facts have gone away; and we're faced with a claim for five million dollars; and -- and the remedies have already been picked and they're being concluded or are concluded at this point. We weren't there. They undertook the work for a decade in the ordinary course of business by their own conduct, and it's their responsibility for the property development.

Thank you very much, Your Honor.

THE COURT: Thank you, counsel.

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(Certification omitted in printing)

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agreement says no course of dealing between the parties -- or among the persons having any interest in this agreement will be deemed effective to modify, amend, discharge any part of this

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agreement or any rights or obligations of any person by reason of. So the argument doesn't fly in terms of contractual analysis. The argument itself is barred by the agreement.

We pointed out that the – Aviall's very uncertain contribution claim can't be asserted because it's not an innocent party. And Aviall has never been the subject of any CERCLA enforcement action or settlement with respect to the environmental conditions of the facility. There is no CERCLA claim, no 107 claim to -- to create the opportunity for contribution.

Mr. Faulk tries to create a hybrid claim, and it flies directly in the face of the OHM Remediation Services decision of the District Court, as recognized by the Fifth Circuit. In that case when a 107 claim went away at the District Court level, the 113 claim was thrown out because it had to be derivative of the 107 lawsuit. There wasn't some hybrid claim that was left over.

And the court noted that Section 113(f) contribution action is derivative of an action under Section 107(a), if only a pending one. Accordingly, the District Court's dismissal of OHM's Section 107(a) action served to void the statutory prerequisite to suit under Section 113(f).

The two cases that were cited by Mr. Faulk as dispositive of this issue that the courts are recognizing

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the hybrid action are inapposite. The Sun case in the Tenth Circuit involved a site that was listed by the United states on the national priorities list of superfund sites. The plaintiffs in that case were issued a Section 106 unilateral administrative order directing them to undertake work at the site. And in the context of their claim against other parties in that case, their 107 claim was thrown out and their 113 claim was allowed to remain, and the only issue was what is the statute of limitations for the 113 claim. It's a legitimate CERCLA claim for contribution. There was the underpinning of federal enforcement in a 106 order.

In the Centurior Services decision in the Sixth Circuit, EPA investigated the Huth oil site, it identified four potentially responsible parties, it issued unilateral Section 106 order directing them to clean up the site.

THE CLERK: Three minutes.

MR. STEPHENSON: Again, their 107 claim was thrown out and the remaining issue was the legitimate contribution action under Section 113(f)(1). Aviall doesn't have the precursor for that kind of an action in this case.

To sum up, Your Honor, the contract makes it clear that there's no contract claim left here. It went away by the terms of the contract. It went away by the express liability doctrine, as recently held in the Fina versus Arco case. And all of the other claims are – don't satisfy the

Company case that we have cited in the brief that allows us to bring this particular cause of action.

THE COURT: Thank you, counsel. Mr. Stephenson.

MR. STEPHENSON: Going back to the contract issues for just a moment, Mr. Faulk attempted to tie in the – the – Aviall's assumption of liabilities for matters incurred in the ordinary course of business, tying it back to the statute of limitations standard.

In fact, the provision in Section 1.03(a)(1) for

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seller's liabilities and obligations incurred after December 31, 1980, in the ordinary course of business is for other than liabilities set forth in the 1.03(b), which is the liabilities not assumed, has a relatively minor role in this case because Cooper hasn't incurred any liabilities, other than its own fees and expenses in this lawsuit. There is no claim against Cooper in this matter under CERCLA or otherwise. And so what we're really looking at is does Aviall have a contractual claim back against Cooper under Section 103.(b).

Mr. Faulk jumps to the middle provision in the indemnification, which is Section 7.02(a)(2), saying, "as a result of a breach by seller of any representation, warranty, covenant or agreement contained –" other than the representations. But, in fact, the following provision, 7.02(a)(3), expressly covers " -- any liability of seller, its affiliates or subsidiaries other than assumed liabilities." Those are the matters that are listed in Section 1.03(b).

Likewise, those provisions -- those liabilities under Section 7.02(c) are limited to a five year statute of limitations under the contract, limitations period. We don't get to 7.02(a)(2).

To the extent there is anything left under 7.02(a)(2), the 1982 release absolutely obviated any such generic

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liabilities, agreements, et cetera. You look at the release, it's all representations, warranties, covenants and agreements of Cooper contained in the agreement are deemed to be fully satisfied forever. Aviall releases Cooper from any and all obligations and claims to indemnify Aviall for any breach of a representation, warranty, covenant or agreement, unless it'' specifically carved out in Section 3.2. There is no carve out for some generic, extraordinary, retained future-arising unknown liability. It just doesn't exist in the contract. There is no provision for things that are unknown at the time of the closing.

The 7.02(e) reference is still irrelevant. The release eliminated any residual agreements that could have existed.

Mr. Faulk raised the issue about the course of conduct of Cooper. We pointed out in the brief: A, that it isn't accurate to try to compare the two. All of the situations referenced by Aviall were off-site CERCLA sites, real CERCLA sites that involved claims against Cooper and Aviall for disposals where there was direct claim of CERCLA liability against the parties. Cooper made the practical judgment to simply buy into the settlements on some sites. But, in fact, the contract, Section 8.06(b) of the

I mean, there are a couple of ways to look at the argument: One is as a result of your doing that Cooper is not liable at all; another way of looking at it is, if in fact you bought a Cadillac when a Volkswagen might have done just as well, they only pay for the part of the Volkswagen. What's your position?

MR. FAULK: Obviously the latter one, Your Honor. In our reply brief, I believe it was, I brought out the fact that it jumps the gun on the question. The question of liability and allocation can be decided without deciding how big the pot of damages should be. If in fact the pot of damages that -- is not to include certain things that the court would deem to be upgrading the property, or unnecessary, that would be cast out and excluded from the ultimate award of damages entirely and only those things which are appropriate would then be decided according to the allocation formula that we have proposed.

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THE COURT: And then perhaps the next question would be by permitting you to do that on your own and by the nature of remediation, understanding that it's not surface work, have you deprived them of a fair opportunity to see whether work was excessive or not, because they're looking at it after the fact.

MR. FAULK: They have not, of course, argued that. That's not been a point that they have raised, that they have been in any way prejudiced as a result of anything that's been done out there. Every single piece of work that's been done out there, and it's a very voluminous set of documents, has been documented here. There are

reports. There are orders and submissions to the TNRCC. And never one has Cooper in any real sense complained that it's been denied the opportunity to find out the identity of persons who do the work, to take their depositions, to look at the documentation for the expense and its reasonableness and necessity. That's just not an argument that's been made.

As a matter of fact, the record is such that they can go and do exactly that. And we'd certainly be happy to, in the course of a damages phase here, to facilitate that by making sure that all the information that we had that we're obviously making a claim on has that particular documentation.

Dr. Zelikson talks about the costs. Mr. Thompson, one

[34]

of our other experts, talks about them. And they have reviewed the entire record. At this point they have not been deposed, but that is a matter they could be deposed upon, on the question of recoverable damages.

I'm at five minutes, maybe I have one minute to sum up. If the court has no further questions, I would just like to mention that I do believe and Aviall believes that this is in fact a contract case, that looking at the terms of the contract there is a meeting of the minds in this case, and that under the terms of the contract there's a recovery here, as well as under the state laws. However, we believe the CERCLA claim is properly framed and properly brought before the court and that the court has subject matter jurisdiction of the CERCLA claim by virtue of the Centurior case and the Sun

Specifically, they said, subject to 7.02, which contains the time limits that aren't applicable to the section we're suing under, the agreements set forth in the agreement survive, notwithstanding, and it's specifically quoted, any examination made for or on behalf of buyer, the knowledge of any of its officers, directors, shareholders, et cetera. And under those circumstances the parties contractually eliminated any argument that continuous employment would somehow of itself give rise to some sense of liability or some sense of knowledge that would sacrifice rights of action under the contract.

I'm going to talk a little bit, Your Honor, if -- did you have questions?

THE COURT: No. You may proceed.

MR. FAULK: I want to talk a little bit, Your Honor, about the question of the petroleum exclusion applicability. We recognize that CERCLA has petroleum exclusion. Our record in the case establishes that there are in fact petroleum costs, that we're not seeking recovery under CERCLA under the petroleum exclusion. But petroleum costs are available, Your Honor, associated with the breach

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of contract action and the various state environmental law causes of action, and we have substantiated those for those purposes. So the full range is available under one or more causes of action that we've asserted in addition to CERCLA.

I also want to talk a bit about the question of substantial compliance that has been discussed here with the

NCP under CERCLA. Mr. Stephenson brings out the point that he believes that the public notice and comment provisions weren't properly satisfied --

THE CLERK: Five minutes.

MR. FAULK: -- in this case. Thank you.

Under the circumstances of this case we're not looking at an action brought by the federal government or the EPA or a state agency of any kind regarding this issue. The 1990 NCP which governs this case, because CERCLA substances weren't discovered on any of the properties until 1991, says that we only have to have substantial compliance. And if you look at the EPA guidelines, specifically those that our expert Mr. Zelikson summarized in his affidavit as he went through this, the purpose of the entire substantial compliance rule is not to penalize parties who go in and clean up sites by requiring excessively technical compliance but rather to make sure that what they do is appropriate to the characteristics of the site and the necessary nature of the response.

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THE COURT: Let me ask you a question that is somewhat related to this concept.

A recurring theme in Cooper's briefing is you went out and did all this upgrading -- you know, they characterize it that way -- of the properties, the four facilities on your own, then at some point you decide to stick us for it so to speak. Is that an issue really of allocation of responsibility as opposed to liability?

does not necessarily alleviate us from the burden of going through and specifically demonstrating and arguing the applicability or the propriety of any number of thousands of bits of information as to what the amount of recoverable damages will be.

There is some discovery that needs to be done to round out the damages. There is some discovery that needs to be done with respect to allocation, if in fact the court determines that the allocation scheme we have proposed requires additional testimony, before a ruling could be done, we would ask the court to give us an opportunity to provide a supplemental expert opinion on that.

THE COURT: But those would be issues under the contract, the purchase agreement, would they not?

MR. FAULK: They would. And under the Solid Waste Disposal Act and Texas Water Code.

So the answer is that there was a substantial amount of work to be done, but if the court determines it has no jurisdiction, the work would necessarily be done somewhere.

THE COURT: Well, I guess another way of phrasing it is what work would you have done that would be lost: and it sounds like it would not be lost, that the arguments

would be made in the context of state claims, whether under the agreement or Texas statutory law.

MR. FAULK: I think, Your Honor, the arguments would definitely be made. We would, of course, only lose that portion of the case which dealt with CERCLA but, of course, that's a critical part of our case.

THE COURT: All right. Why don't you return then to your arguments. I just wanted to make certain I got my questions answered.

MR. FAULK: That's all right. I'm happy to do that.

I wanted to talk a little -- some about the CERCLA claim, but there's one thing I wanted to mention, and I can't ignore, with respect to an argument that Mr. Stephenson made. Mr. Stephenson argued that Mr. Lambert, who was a ***continuous*** employee of both Cooper and then Aviall in an executive position for a year or so after the transaction, that that somehow imbued Aviall with some sort of knowledge that this really was something that was not newly discovered, that everyone knew this had happened. And Mr. Lambert's deposition was taken in this case and it did not establish that he had specific knowledge.

But the most important thing, if the court will look at Section 7.01 of the contract, page 10 (sic) of the little handout that I gave you, and the interesting thing about

that, is that in that section the parties contractually agreed that the knowledge of continuing employees was to have no affect on the survival of causes of action granted in the contract.

how-are you using 107 when we look at 113.

MR. FAULK: Yes, Your Honor. What I'm trying to do is use 107 as an element of the contribution cause of action under 113 in this type of lawsuit. That is as clear as I think I can make it.

THE COURT: That was pretty straightforward. That's fine.

MR. FAULK: Okay. Okay.

THE COURT: And what is your response to the -- to the contention that the absence of notice deprives this court of subject matter jurisdiction?

MR. FAULK: Your Honor, I heard the court's question regarding that, and Mr. Stephenson was quite right in part of his answer. The cases that he relies upon are all cases involving citizen suits under RCRA or the Clean Water Act where the party bringing the cause of action is serving as the private Attorney General on behalf of the government, essentially representing the government, representing the government's interests in securing penalties that are then payable to the government. Where a party is representing the United States Government is standing in its shoes as the private Attorney General, there is a great incentive for the government to be aware of the litigation, for the government to be aware and have the right to make an informed decision as to whether to

participate or not. However, here we're not serving as the private Attorney General. We're not representing the government here.

This is a private cause of action, seeking money damages only, between two PRPs. And under those circumstances, the interests underlying the notice in those statutes are diametrically different. Had the notice -- the failure of the notice in this situation is nowhere close to having the impact that it does on the government. The government still has its rights, even with the belated notice, to take whatever action it deems appropriate to enforce this matter, irrespective of whether -- what time the notice was received. Our actions have no affect on their standing. But in another case, the Clean Water Act or RCRA, they could severely compromise the government's position if the notice was not received.

THE COURT: If the court were to decline to exercise supplemental jurisdiction over state claims, what would you and Cooper have left to do but to take the state briefing that you have and present it to a state court that we generally recognize is more familiar with state issues? What is there left to do in the lawsuit, other than take the discovery you have and the arguments and present them to a state tribunal?

MR. FAULK: Well, there are some issues of

discovery with respect to supplementing expert opinions, with respect to updating the cost information. And I want to tell the court that by shifting it over to the state court, it's -- it

Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

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No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner*,

v.

AVIALL SERVICES, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107(a), 42 U.S.C. §§ 9606 or 9607(a), may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

RULE 29.6 STATEMENT

Petitioner Cooper Industries, Inc. is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Respondent Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

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In the Supreme Court of the United States

No. 02-1192

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit, sitting *en banc,* is reported at 312 F.3d 677 (5th Cir. 2002), and appears in the Appendix to Cooper Industries' Petition for A Writ of Certiorari ("Pet. App.") at 9a. The Fifth Circuit's grant of the petition for rehearing *en banc* by Aviall Services is reported at 278 F.3d 416 (5th Cir. 2001), and appears at Pet. App. 46a. The panel opinion of the Fifth Circuit is reported at 263 F.3d 134 (5th Cir. 2001), and appears at Pet. App. 47a. The district court's opinion, No. 3:97-CV-1926-D (N.D. Tex. Jan. 13, 2000), is unreported and appears at Pet. App. 90a.

JURISDICTION

The Fifth Circuit entered its judgment on November 14, 2002. Pet. App. 9a. Petitioner Cooper Industries timely filed its Petition for a Writ of Certiorari on February 12,

2003. This Court granted certiorari on January 9, 2004 and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the pertinent provisions of 42 U.S.C. §§ 9606, 9607, and 9613 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), appears at Pet. App. 1a-8a.

STATEMENT OF THE CASE

This case involves a dispute over environmental costs incurred at four aircraft engine maintenance facilities in Texas. Petitioner Cooper Industries, Inc. ("Cooper") owned and operated these facilities until 1981, when it sold them to respondent Aviall Services, Inc. ("Aviall"). Pet. App. 48a. Aviall operated the four sites for several years and admittedly contributed to the contamination of these four properties during this time. *Id.* Beginning in 1984, Aviall, on its own, commenced an environmental cleanup of the sites which it claims continued over a span of some 10 years (*id.*), and cost the company approximately $5 million. Joint Appendix ("J.A.") 15A. Between 1987 and 1990, Aviall notified the Texas Natural Resource Conservation Commission ("TNRCC") of the alleged contamination. Pet. App. 48a. TNRCC sent several letters to Aviall concerning the condition on its property, but took no legal action. Pet. App. 10a. There appears to have been no contact with the United States Environmental Protection Agency ("EPA"), and none of the four facilities has ever been designated as a contaminated site under federal law. *Id.* Aviall sold all four facilities to other parties during 1995 and 1996, but retained

responsibility for any continuing cleanup activity that might be necessary. J.A. 15A.

In August 1997, Aviall filed the present action in the United States District Court for the Northern District of Texas, seeking recovery from Cooper of the environmental cleanup costs that Aviall had elected to incur. J.A. 8A. As originally filed, the lawsuit sought direct recovery from Cooper pursuant to 42 U.S.C. § 9607(a) ("Section 107(a)") and also asserted a right of CERCLA contribution from Cooper pursuant to 42 U.S.C. § 9613(f)(1) ("Section 113(f)(1)"). J.A. 16A. Several Texas state law claims were included as well. J.A. 18A-25A. Aviall subsequently amended its complaint to remove the Section 107(a) direct cost-recovery claim (Pet. App. 49a, *see also* J.A. 27A),[1] and to add state law contribution claims under two Texas environmental statutes, the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Chapter 361, and the Texas Water Code, Tex. Water Code Ann. § 26.3513(j). J.A. 27A, 42A-44A.

Cooper filed for summary judgment on Aviall's contribution claim, arguing that, because Aviall was never the subject of a Section 106 or 107(a) civil action, it failed to satisfy Section 113(f)(1)'s requirement that contribution actions only be brought "during or following" such a civil action. The district court granted Cooper's motion. Pet. App. 11a.[2] On August 14, 2001, a divided panel of the Fifth

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[1] When questioned by the district court about the removal of its Section 107(a) claim, Aviall's counsel conceded that it could not pursue a claim for direct recovery of costs under Section 107(a) because of its contribution to the site contamination while operating the facilities. J.A. 91A-93A; *and see* Pet. App. 10a; *see also* n. 29, *infra*.

[2] In granting summary judgment, the district court declined to exercise supplemental jurisdiction over Aviall's state law claims, and dismissed the action. Pet. App. 99a. The dismissal was without prejudice to Aviall

Circuit affirmed, holding that a potentially responsible party ("PRP") "seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." Pet. App. 66a.

Aviall's petition for rehearing *en banc* was granted on December 19, 2001. Pet. App. 46a. On November 14, 2002, a divided Fifth Circuit, sitting *en banc*, reversed. Pet. App. 33a. The court's majority found Section 113(f)(1)'s "savings clause" to be controlling. That clause states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] . . . or section [107(a)] of this title." 42 U.S.C. § 9613(f)(1). According to the *en banc* majority, this language forecloses reading the provision's initial clause as limiting the federal right of contribution under Section 113(f)(1) to suits brought "during or following" a Section 106 or 107(a) civil action. Pet. App. 33a. Three judges dissented, observing that Section 113(f)(1)'s first sentence is, in point of fact, its enabling clause, and, under conventional canons of statutory construction, it is the enabling clause, not the following savings clause, that contains the provision's operative language. Because Aviall failed to satisfy the enabling clause's "during or following" requirement, the dissent concluded that the instant Section 113(f)(1) suit for contribution should be dismissed. Pet. App. 34a-45a.

Cooper timely filed its certiorari petition seeking review by this Court on February 12, 2003. The writ was granted on January 9, 2004.

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refiling its Section 113(f)(1) contribution action in the future, in the event a Section 106 or Section 107(a) action is brought against the company. Pet. App. 98a.

SUMMARY OF THE ARGUMENT

This case involves an issue of statutory interpretation under CERCLA, specifically, whether a party which has voluntarily incurred costs to clean up hazardous waste sites may bring a federal cause of action for contribution under Section 113(f)(1) in the absence of a CERCLA suit to establish the underlying liability. The plain language of the provision in question enables covered persons to sue "any other person who is liable or potentially liable" for contribution "during or following any civil action" under Sections 106 or 107(a) of CERCLA. Congress explicitly provided in Section 113(f)(1)'s second and third sentences that such suits were to be "governed by federal law," and that, in resolving such contribution claims, courts were to "allocate response costs among liable parties." 42 U.S.C. § 9613(f)(1). The provision's final sentence, using standard "savings clause" language, ensures that the right of contribution created in the provision's enabling clause will not "diminish the right of any person" to pursue whatever other rights of contribution might be available. When read together, both the text and context of Section 113(f)(1)'s four sentences compel the conclusion that CERCLA provides only a limited right of contribution which is available exclusively to litigants who have been subject to a Section 106 or Section 107(a) civil action. *See, e.g.*, *Lamie v. United States*, 124 S. Ct. 1023, 1030 (2004) (""W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms."") (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted), quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Congress added Section 113(f)(1) to CERCLA in 1986 as part of SARA. Before SARA's enactment, CERCLA had contained no statutory right of contribution. To be sure, contribution was available as a means of recovering cleanup costs under various state laws. The federal common law also recognized a right of contribution between and among joint tortfeasors, allowing a party which had discharged its liability to pursue other responsible parties for payment of their share of response costs. Indeed, in reliance on the federal common law, some district courts had held that CERCLA enforcement actions under Section 106 or 107(a) would support claims of contribution by implication. *See, e.g., United States v. Medley*, 1986 U.S. Dist. LEXIS 23365, *3-*5 (D.S.C. July 1, 1986) (citing cases); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1491-92 (D. Colo. 1985) (citing cases). Congress enacted Section 113(f)(1) specifically to codify this implied right of contribution. Just as with the implied right, the statutory right created by Congress was available only to those persons who were or had been subject to a civil action under Section 106 or Section 107(a) of CERCLA. Furthermore, by enabling only those persons who faced liability for response costs to pursue contribution against only those persons who shared responsibility for the site contamination, Congress kept faith with the federal common law's core principle of "shared liability."

The court below finds in Section 113(f)(1)'s savings clause a much broader contribution right. It is, however, a fundamental canon of statutory construction that a statute's savings clause cannot be read to override its enabling clause. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Int'l Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987). Here, a construction of Section 113(f)(1) that permits parties, like Aviall, to pursue a claim of contribution without any previous adjudication or ordered discharge of its liability,

renders wholly superfluous the "during or following" requirement in SARA's federal contribution provision. It also undercuts Congress' effort in SARA to encourage persons responsible for contaminated sites to settle their cleanup claims with the government (Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B)), and in large measure defeats SARA's attempt to minimize the prospect of any single party facing multiple, inconsistent findings of liability (Section 113(f)(2), 42 U.S.C. § 9613(f)(2)). In addition, if the Fifth Circuit's free-standing right of contribution is, indeed, available under Section 113(f)(1)'s savings clause, the three-year limitations' period (Section 113(g)(3), 42 U.S.C. § 9613(g)(3)) that Congress prescribed for the right of contribution brought "during or following a civil action under section [106] . . . or under section [107(a)] . . . " has no application whatsoever to a "savings clause contribution claim" pursued in the absence of such a civil action. Thus, not only does this overly expansive reading of Section 113(f)(1) find no support in the statute's text or essential purpose, but it also defies the coherent structure of SARA's contribution provisions.

In such circumstances, the policies behind the legislation add little to the analysis. *Lamie*, 124 S. Ct. at 1030; *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Ron Pair Enters.*, 489 U.S. at 240. The court below nonetheless suggests that its broader understanding of Section 113(f)(1)'s right of contribution is more hospitable to Congress' presumed interest in encouraging voluntary cleanups of hazardous waste sites. Pet. App. 31A. It is, however, far from clear that Congress viewed CERCLA's enactment as essential to the furtherance of such an interest. What is clear, is that, whatever the policies Congress sought to advance through its CERCLA legislation, it certainly did not regard a right of contribution (in any form) as essential to those policy objectives. Rather, CERCLA, as originally

enacted, was silent on the subject of contribution rights, leaving the matter wholly to the federal common law – which districts courts only later sought to import into the statute by implication. SARA made that implied right explicit. Thus, to suggest that Section 113(f)(1) must be read any more broadly than petitioner urges, so as to ensure that CERCLA policies will not be disserved, may well be a judicial afterthought that warrants mention, but it is hardly a consideration that Congress took into account (either at the time of the original enactment or when the SARA amendments were added). Nor is there any reason for it to occupy the attention of this Court in the present inquiry. The text of the statute is clear, and its grant of a conditioned right of contribution accomplishes the result that Congress fully intended. Reversal of the decision below is, therefore, required.

ARGUMENT

A. CERCLA Background

1. The Original Enactment

In 1980, Congress enacted CERCLA to confront the serious environmental and health problems resulting from contamination of property by hazardous substances. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The twin goals of CERCLA have been unambiguously identified: "(1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups." H.R. Rep. No. 99-253 (III) at 15 (1985); *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038; *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (CERCLA provides a dual mechanism for cleaning up sites and imposing costs of cleanup on those responsible for contamination).

To advance these goals, CERCLA provides two primary vehicles for cleaning up contaminated properties. Under Section 104 of the statute, the EPA may use the Hazardous Substance Superfund to pursue its own response actions. *See* 42 U.S.C. § 9604; *Bestfoods*, 524 U.S. at 55. Alternatively, under Section 106(a), 42 U.S.C. § 9606(a), the EPA may, by issuance of an administrative order or through a suit seeking judicial relief, compel persons responsible for contamination to undertake response actions that EPA will monitor. In either event, the United States may recover its response costs in an action under Section 107(a) against "covered persons" who contributed to the release or threatened release of a hazardous substance.[3] 42 U.S.C. § 9607(a)(1)-(4)(A). These persons – commonly referred to as "potentially responsible parties" ("PRPs") – may be subject to joint and several liability for all cleanup costs which are the subject of such a cost recovery action.[4] *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

Section 107(a) cost recovery actions are also available to States, Indian tribes, and certain "other" persons who have incurred response costs "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(1)-(4)(B). An early question raised as to what was intended by the term

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[3] The statute identifies four categories of "covered persons:" (1) current owners and operators of vessels or facilities where hazardous substances were disposed of; (2) past owners or operators of any such facilities; (3) persons who arranged for transport for disposal or treatment of hazardous substances; and (4) persons who accepted any such substances for transport to disposal or treatment facilities. 42 U.S.C. § 9607(a).

[4] Section 107(a) authorizes the recovery of all costs that are "not inconsistent with the national contingency plan," which is the federal regulatory scheme establishing the procedure for conducting hazardous waste cleanups. *See* 42 U.S.C. § 9605; 40 C.F.R. § 300; 42 U.S.C. § 9601; 33 U.S.C. § 1321 (Clean Water Act).

"other" has been resolved by the circuit courts as having reference only to persons other than "covered persons" – that is, only to those who neither own nor contaminated the property cleaned up. *See In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc. v. Cummings Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996) (same); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

Between or among persons responsible for, or holding an ownership interest in, contaminated facilities or property, CERCLA originally contained no right of contribution. Pet. App. 15a. Nonetheless, during the mid-1980s, a number of district courts held that Section 107(a) could be read to include, by implication, the common law right of contribution exercisable by the target of a government action under Section 106 or 107(a), so as to permit joinder of other PRPs in the action.[5] Juxtaposed against this line of district court decisions were, however, two holdings of this Court declining, in analogous contexts, to read implied contribution rights into a statute that did not expressly provide for such rights. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91-95 (1981).

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[5] *See, e.g., New York v. Shore Realty Corp.*, 648 F. Supp. 255 (E.D.N.Y. 1986); *United States v. New Castle County*, 642 F. Supp. 1258 (D. Del. 1986); *United States v. Ward*, 1984 U.S. Dist. LEXIS 16774 (E.D.N.C. May 11, 1984); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1986); *Medley*, 1986 U.S. Dist. LEXIS 23365; *Wehner v. Syntex Agribusiness*, 616 F. Supp. 27 (E.D. Mo. 1985); *Asarco*, 608 F. Supp. at 1484; *Mola Dev. Corp. v. United States*, 1985 U.S. Dist. LEXIS 22674 (C.D. Cal. Feb. 11, 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

2. The SARA Amendments

In the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress sought to resolve the recurring question of whether "covered persons" under CERCLA could seek contribution from other PRPs by enacting an express federal right of action for contribution. Specifically, SARA added a new provision – CERCLA Section 113(f)(1) – in order to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties . . . ." S. Rep. No. 99-11, at 44 (1985), *reprinted in* 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986. *See also* 131 Cong. Rec. 24,716, 24742 (1985) ("defendants under Superfund should have a right of contribution to bring in additional defendants so that all parties may be before the court at the same time to determine issues of liability and damages with the appropriate determination as to contribution and/or indemnification") (Sen. Specter). The exact language added states:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the

> right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1).

In addition, SARA created a separate federal right of contribution in new Section 113(f)(3)(B), available to any "person who has resolved its liability to the United States or a State for some or all of a response action, or for some or all of the costs of such action, in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). Even persons who contributed only minimally to the contaminated condition could avail themselves of this provision upon consummation of an approved settlement with the federal or state environmental enforcement authority. *See, e.g.*, 42 U.S.C. § 9622(g) (*de minimis* settlements); 42 U.S.C. § 9622(h) (administrative orders).[6] Contribution under Section 113(f)(3)(B) can be sought, however, only from other PRPs who have not themselves previously settled their response costs with respect to the same site, since Section 113(f)(2) of SARA insulates all settling parties from liability in future contribution actions. *See* 42 U.S.C. § 9613(f)(3)(B) *and* 42 U.S.C. § 9613(f)(2).

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[6] Since Aviall never entered into an approved settlement with the United States or the State of Texas regarding its response costs, it could not have, and in fact has not, pursued Cooper for contribution under Section 113(f)(3)(B).

B. CERCLA's Plain Language, Its Essential Purpose, And Its Overall Structure Support Petitioner's Reading of Section 113(f)(1)

1. Section 113(f)(1)'s Plain Language Limits When Contribution Actions May Be Brought

The starting and ending point for any examination of a federal statute is the language itself. *See Lamie*, 124 S. Ct. at 1030 ("'[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins.*, 530 U.S. at 6 (2000) (internal quotation marks omitted), quoting *Ron Pair Enters., Inc.*, 489 U.S. at 241, in turn quoting *Caminetti*, 242 U.S. at 485). Here, Section 113(f)(1) is embodied in four sentences, which, under traditional canons of statutory construction, are to be read together, not apart from one another. *See Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 n.7 (2003) (a cardinal rule of statutory construction is "that a statute is to be read as a whole") (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Adherence to this fundamental precept yields but one conclusion: that Section 113(f)(1) contribution can be pursued by a covered person only after that person has been sued by the government in a Section 106 or Section 107(a) civil action, whether pending or concluded.

The provision's first sentence contains its operative language, enabling covered persons to pursue other PRPs for contribution "during or following any civil action under section [106] . . . or under section [107(a)of this title." 42 U.S.C. § 9613(f)(1). The majority below and respondent

here seize upon the use of the word "may" in the Section's opening line – *i.e.*, "[a]ny person may seek" – to argue that Congress intended its newly created right of action to be unconditionally available. Pet. App. 25a (deeming the quoted phrase "a statement of non-exclusive circumstances in which actions for contribution may be brought").[7] Yet, the clear implication of a congressional directive that one "may" take an action upon the occurrence of a specific condition precedent is that, in the absence of that condition occurring, one may not. Nor is the word "only" necessary to make any clearer the intentions of this deliberately chosen syntax.[8]

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[7] This more expansive view of the statute's contribution provision is shared by the Sixth and Tenth Circuits. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 (6th Cir. 1998); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192-93 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998). Most recently, a panel of the Ninth Circuit has also addressed the issue, albeit under different circumstances, and, in *dicta*, has expressed agreement with the Fifth Circuit's view that Section 113(f)(1)'s right of contribution is not limited to suits brought "during or following a civil action under section [106] . . . or under section [107(a)] of this title." *See Western Properties Serv. Corp. v. Shell Oil Co.*, No. 01-55676, 2004 U.S. App. LEXIS 2426, at *10-*13 (9th Cir. Feb. 13, 2004). The Ninth Circuit distinguished the allegations in the case before it from those in the instant case, observing that, "unlike in *Aviall*, Western Properties originally asserted both a § 107(a) response-cost recovery and a § 113(f)(1) contribution claim and maintained those claims when it amended its complaint." It thus held that Western Properties could maintain its claim under Section 113(f)(1) because 'the contribution action in this case was pursued "during . . . a civil action under . . . 107(a).'" *Id.* at *14 (footnote omitted).

[8] While both sides can point to the contemporary definition of "may" as supporting their positions, whether, as used here, the word means "shall [or] must," as Cooper contends, or is to be regarded as meaning "have liberty to," as respondent maintains, depends, of course, on both syntax and context. *See* WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993).

Congress could not have announced Section 113(f)(1)'s condition precedent more precisely or emphatically than it did in the first sentence's "during or following" clause. Under one of the most basic canons of statutory interpretation – *expressio unius est exclusio alterius* – this clear expression of a conditioned right suggests that all else was intentionally excluded. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23, at 306-07 (6th ed. 2000); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (*expressio unius* principle bars judiciary from reading a heightened pleading requirement into federal rules). *See also Lamie*, 124 S. Ct. at 1032 (scope of statute may not be enlarged by an interpretation that goes beyond what the language in fact permits).

That is, indeed, the reading of Section 113(f)(1) that appeared inescapable to the First and Seventh Circuits. *See Rumpke*, 107 F.3d at 1241; *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir.), *cert. denied*, 510 U.S. 914 (1993).[9] It is, moreover, the way in which similar statutory language has been construed in other contexts not unlike the one here. *See FDIC v. Bates*, 42 F.3d 369, 371 (6th Cir. 1994) (statute providing that financial institution official "may" be held liable for gross negligence deemed to provide exclusive circumstances where liability could be found); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993) (same).

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[9] Recently, a federal district court in New Jersey reached the same conclusion. *E.I. DuPont de Nemours & Co. v. United States*, No. 97-497, 2003 WL 23104700 at *11, (D.N.J. Dec. 30, 2003). In explicitly rejecting the Fifth Circuit's reading of Section 113(f)(1), the court there relied heavily on the Third Circuit's decision in *In re Reading Co.*, 115 F.3d 1111, 1114 (3d Cir. 1997), which held that CERCLA's contribution action was required by the plain language of the statute to conform to the common law understanding of contribution. *And see* discussion *infra*, at pp.27-30

The remaining text of Section 113(f)(1) reinforces this conclusion. The provision's second sentence unambiguously confirms that Congress intended the express right of contribution featured in the first sentence to describe the sole substantive right being created. It commands, emphatically, that any Section 113(f)(1) contribution claim "*shall* be brought in accordance with this section" – *i.e.*, "during or following any civil action under section [106] . . . or under section [107(a)] of this title" – and "shall be governed by Federal law." 42 U.S.C. § 9613(f)(1) (emphasis added). The last reference is to federal common law, which is effectively what Section 113(f)(1) intended to codify, and which allows only those joint tortfeasors who are or were the subjects of pending or concluded actions to seek contribution – the very result that the restriction in Section 113(f)(1)'s first sentence serves to accomplish. *See, e.g.*, *Key Tronic*, 511 U.S. at 816 n.7 (recognizing common law underpinnings of SARA).

Looking to the provision's third sentence, its interplay with the first two is readily apparent. Sentence three directs district courts to "allocate response costs" associated with Section 113(f)(1) contribution claims "*among liable parties*." 42 U.S.C. § 9613(f)(1) (emphasis added). This language comfortably fits with the enabling clause's "during or following" requirement, by ensuring that the private party seeking contribution is, in fact, a "liable part[y]."[10] And because, under Section 113(f)(1)'s first

[10] The circuit courts which have addressed the issue, including the Fifth Circuit, agree that defendants who are the subject of a Section 106 or Section 107(a) civil action are jointly and severally liable. *See, e.g.*, *In re Reading*, 115 F.3d at 1120; *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889 901-02 (5th Cir. 1993); *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

sentence, that party may seek contribution only against a "person who is liable or potentially liable under [Section 107(a)]," the very essence of a contribution claim – *i.e.*, shared liability – is preserved. In sharp contrast, the construction of the statute offered by the Fifth Circuit disregards the importance of this cornerstone of contribution that was firmly established in the federal common law when SARA was enacted, *see Northwest Airlines*, 451 U.S. at 87, and remains an essential element of the concept of contribution. *See E.I. Dupont de Nemours & Co.*, 2003 WL 23104700 at *4 (contribution "denotes a claim by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make") (quoting *In re Reading*, 115 F.3d at 1124).

Section 113(f)(1)'s last sentence is understood by all members of the court below to be a "savings clause," Pet. App. 12a, 26a (*en banc* majority); 36a (dissent). Using standard "savings" language, it provides that nothing in the provision's first three sentences "shall diminish" any other existing right "to bring an action for contribution in the absence of a civil action under section [106] . . . or section [107] of this title." 42 U.S.C. § 9613(f)(1). The purpose of a savings clause is to ensure that the statute in which it appears will not preempt whatever *other* rights of action exist to rectify the harms addressed in the new legislation. *Atherton v. FDIC*, 519 U.S. 213, 227-28 (1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387 (1982). True to form, Congress here provided that the federal right of contribution created by Section 113(f)(1)'s opening sentence should not be construed in any respect to "*diminish*" contribution rights otherwise available. 42 U.S.C. § 9613(f)(1) (emphasis added).

The dissent below observed that this language – which by its very nature is intended to impact only other

contribution schemes – was inserted to save all state law actions for contribution.[11] Pet. App. 36a. Undoubtedly, this

[11] The appeals court's *en banc* majority appears not to dispute that state law contribution actions are saved by Section 113(f)(1)'s last sentence, but suggests that only a few states actually allow state contribution actions. Pet. App. 32a n.28. In fact, state statutory and common law provides a broad range of contribution rights that Section 113(f)(1)'s savings clause makes clear are to remain undiminished in their force and effect. *See* ALASKA STAT. § 09.17.080 (2001); ARIZ. REV. STAT. ANN. § 12-2501 (1994); ARK. CODE ANN. § 13-50.5-102 (West 1989); CAL. CIV. PROC. CODE § 875 (2001); COLO. REV. STAT. § 13-21-111.5 (2001); CONN. GEN. STAT. ANN. § 52-572h(h) (West 1991); DEL. CODE ANN. tit. 10, § 6302 (1974); FLA. STAT. ANN. § 768.31 (West 1986); GA. CODE ANN. § 51-12-32 (Supp. 1994); HAW. REV. STAT. § 663-12 (1985) (expiring Oct. 1995 by statutory mandate); IDAHO CODE § 6-803 (1990); ILL. ANN. STAT. ch. 740, ¶ 100/2 (Smith-Hurd 1993); IOWA CODE ANN. § 668.5 (West 1987); KAN. STAT. ANN. § 60-2413 (2001); KY. REV. STAT. ANN. § 412.030 (Michie/Bobbs-Merrill 1992); LA. CIV. CODE ANN. art. 1804 (West 1987); MD. ANN. CODE art. 50, § 17 (1994); MASS. GEN. LAWS ANN. ch. 231B § 1 (West 1986); MICH. COMP. LAWS ANN. § 600.2925a (West 1986); MISS. CODE ANN. § 85-5-7(4) (1991); MO. REV. STAT. § 537.060 (1988); MONT. CODE ANN. § 27-1-703 (1993); NEV. REV. STAT. § 17.225 (1991); N.H. REV. STAT. ANN. § 507:7-f (Supp. 1994); N.J. STAT. ANN. § 2A:53A-2 (West 1987); N.M. STAT. ANN. § 41-3-2 (Michie 1978); N.Y. CIV. PRAC. L. & R. 1401 (McKinney 1976); N.C. GEN. STAT. § 1B-1 (1983); N.D. CENT. CODE § 32-38-01 (1976); OHIO REV. CODE ANN. § 2307.31 (Baldwin 1990); OKLA. STAT. tit. 12, § 832 (1991); OR. REV. STAT. § 18.440 (1993); 42 PA. CONS. STAT. ANN. § 8324 (1982); R.I. GEN. LAWS § 10-6-3 (1985); S.C. CODE ANN. § 15-38-20 (Law. Co-op. 1977 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 15-8-12 (1984); TENN. CODE ANN. § 29-11-102 (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 33.015 (Vernon Supp. 1995); UTAH CODE ANN. § 78-27-40 (2001); VA. CODE ANN. § 8.01-34 (Michie 1992); VT. STAT. ANN. §1036 (2001); WASH. REV. CODE ANN. § 4.22.040 (West 1988); W. VA. CODE § 55-7-13 (1994); WIS. STAT. ANN. § 885.285(3) (West Supp. 1994); WYO. STAT. § 1-1-109 (2001); *see also Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So. 2d 367 (Ala. 1993) (Alabama), *cert. denied*, 511 U.S. 1051 (1994); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 223 (D.C. Cir. 1942) (District of Columbia); *Bedell v. Reagan*, 192 A.2d 24, 26 (Me. 1963) (Maine); *Skaja v. Andrews Hotel Co.*, 161 N.W.2d 657 (Minn. 1968) (Minnesota); *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 229 N.W.2d 183 (Neb. 1975) (Nebraska).

is true. Indeed, *in this very case,* Aviall has asserted two separate state law contribution claims against Cooper under Texas environmental statutes.[12] Pet. App. 91a. Additionally, the final clause, as written, saves those federal rights of action for contribution that can be maintained outside Section 113(f)(1). This includes the federal right of contribution separately created by SARA in Section 113(f)(3)(B), which allows a person to seek contribution following a settlement with the federal or state government.[13] *See* p. 12 *supra.* All such other rights of contribution, whether state or federal, are protected by the statute's savings clause.

It is difficult to imagine that Congress could have intended otherwise. Having enacted Section 113(f)(1) for the express purpose of codifying an explicit federal right of contribution like the one the lower courts had implied (*see* n.

[12] As previously indicated, *see* p. 3, *supra.* Aviall's First and Second Amended Complaints sought contribution under both the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.344(a), and the Texas Water Code, Tex. Water Code Ann. § 26.3513. J.A. 42A-44A; 63A-65A.

[13] The intent to ensure a right of contribution for those who settled their response claims with government environmental authorities was apparent in the earliest drafts of the savings clause language. *See* S. 494, 99th Cong. § 202, at 23 (Feb. 22, 1985) ("[e]xcept as provided in paragraph (4) [allowing a party that had settled to seek contribution] of the subsection, this subsection shall not impair any right of indemnity under existing law"); *see also* H.R. 1342, 99th Cong. § 202, at 23 (Feb. 28, 1985) (identical language); *and see* Environmental Law Reporter Superfund Deskbook 46 (1989 ed.) (reflecting concern that nothing in the new Section 113(f)(1) should affect or modify the rights of a government or person that has settled with the United States from seeking contribution against non-settling persons).

5, *supra*),[14] Congress could have hardly expected that the language it added to save all other contribution rights would be read to render wholly superfluous its very purpose for the legislation. *See* discussion at pp. 27-30, *infra*. The Fifth Circuit has, however, done just that, by construing the savings clause *to delete* the enabling clause's express condition on its grant of contribution. Specifically, the majority below understands the statute's clear command that "[n]othing in this subsection shall diminish" other existing rights of contribution as *an intended enlargement* of the enabling clause itself. Under this interpretation, Section 113(f)(1) effectively authorizes federal contribution actions both by parties who have never been the subject of a Section 106 or Section 107(a) civil action, *and* by parties "during or following" their involvement in such an action. Pet. App. 14a ("Section 113(f)(1) *authorizes* suits against PRPs in both its first and last sentence . . . ") (emphasis added).

Certainly, the plain language of the enabling clause does not alone support such a conclusion. Nor do the words of the savings clause, which on their own terms create nothing, but simply preserve, undiminished, *other* contribution rights that may exist elsewhere. *Atherton*, 519 U.S. at 228. *See also United States v. Locke*, 529 U.S. 89, 105 (2000) (a savings clause creates no substantive rights of its own, operating only to protect rights existing otherwise and elsewhere). To read Section 113(f)(1) otherwise – that is, as creating in its final sentence a broad federal right of contribution that overrides the limitations explicitly imposed

[14] *See* H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 (Section 113(f)(1) was intended to "confirm" the decisions of those federal courts that had implied a right of contribution under CERCLA); 131 Cong. Rec. 24,425, 24,450 (1985) (statement of Sen. Stafford, predicting that Section 113 would "remove[] any doubt" as to contribution right).

on contribution by the sentence first written – defies every recognized principle of statutory construction. *See Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 340-41 (1994) (statutes should not be read to render other provisions in the same enactment inoperative) (*citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)); *Morales*, 504 U.S. at 384 (general savings clause will not be read to override specific provisions of statute); *Northwest Airlines*, 451 U.S. at 91-92 (implied rights of contribution are disfavored).

This Court has specifically admonished that a savings clause should not be read to override or negate a statute's enabling clause. *Morales*, 504 U.S. at 384 (savings clause will not be interpreted to render specific provisions inoperative); *Oullette*, 479 U.S. at 494 (declining to undermine statute by application of general savings clause). Indeed, the general rule of choice is that any tension between a statute's savings clause and enabling clause should be resolved by invalidating the savings clause. *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:12 (6th ed. 2000). Here, of course, there is no need to take such drastic action since both clauses, if neither is overread, fit well with one another.[15] As observed by this Court earlier this Term, a statute should not be read to authorize an absurd result when its plain language can be read to have a "plain, non-absurd meaning." *Lamie*, 124 S. Ct. at 1032.

[15] Indeed, throughout the legislative process, Congress considered the two clauses as complementary to one another, not contradictory. Thus, early House and Senate bills included versions of both the enabling clause and the savings clause, as did H.R. 2005, which went to the House Senate Conference and produced much of Section 113(f)(1)'s final language. *See* S. Rep. No. 99-73, at 90 (1985).

2. The Statute's Essential Purpose Supports A Limited Right of Action Under Section 113(f)(1)

Congress passed Section 113(f)(1) to make explicit a previously implied right of contribution, as found in federal common law, by enabling those parties which were or had been the subject of cost recovery actions under Sections 106 or 107(a) of CERCLA to implead or bring separate actions against third parties responsible or potentially responsible for the contamination. As Senator Stafford observed during the floor debate on the legislative language that eventually went to conference: "It was and is my understanding that the amendment is solely to correct a difficulty which some third-party plaintiffs are encountering in obtaining joinder of third-party defendants in claims for contribution under CERCLA." 131 Cong. Rec. at 24,743 (Sen. Stafford).[16] Senator Specter underscored the same point, stating: "defendants under Superfund should have a right of contribution to bring in additional defendants so that all parties may be before the court at the same time to determine issues of liability and damages with the appropriate determination as to contribution and/or indemnification." *Id.* at 24,742 (Sen. Specter). A similar understanding of the purpose of the legislation was expressed in the House Report accompanying the SARA amendments:

> This section clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from

[16] While legislative history must be used cautiously in trying to discern the Congressional intent behind the language of a statute, *see Lamie*, 124 S. Ct. at 1032-33, Congress' design, object, and policy certainly can be helpful to an understanding of the purpose of the legislation. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

> other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.

H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861 (emphasis added).[17]

At the time of SARA's enactment, every case finding an implied right of contribution arose in the context of a pending or concluded Section 106 or Section 107(a) civil action. *See* n.5, *supra*. The House Report accompanying the language that became Section 113(f)(1) explicitly mentioned two of those cases, where federal district courts had held that an implied right of contribution existed as part of an underlying Section 107(a) suit:

> It has been held that, when joint and several liability is imposed under section 106 or 107(a) of the Act, a concomitant right of contribution exists under CERCLA, *United States v. Ward*, 8 Chem. & Rad. Waste Litg. Rep. 484, 487-88 (D.N.C. May 14, 1984). Other courts have recognized that a right to contribution exists without squarely addressing the issue. See, e.g., United States v. South Carolina Recycling and Disposal, Inc., 7 Chem. & Rad. Waste Litig. Rep. 674, 677 (D.S.C. February 23, 1984). This section

[17] Similarly, the Senate Report noted an express contribution remedy was being added to CERCLA to "clarif[y] and confirm[] the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." S. Rep. No. 99-11 at 44 (1985) (emphasis added).

> clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or costs that may be greater than its equitable share under the circumstances.

See H. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861.[18]

The House Report also described the litigation context in which the new contribution right would arise:

> The section contemplates that *if an action under section 106 or 107(a) of the Act is under way*, any related claims for contribution or indemnification may be brought in such an action. This provision should also encourage private party settlements and cleanup since the actuality of being brought into litigation as a third-party defendant, concurrent with the original litigation, has the effect of bringing all such responsible parties to the bargaining table at an early date. In addition, this provision will lessen any ill will that is created between the government and the original defendants selected by the government for naming in the original suit. *This provision allows all counterclaims, cross-claims and third-party actions to be dealt with in a single action if the court is so inclined.*

H. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862 (emphasis added).

[18] In contrast, the cases cited by the Fifth Circuit for the proposition that other early federal court decisions allowed actions for recovery "in the nature of contribution" to proceed, even though the plaintiff had not been sued under Section 106 or Section 107(a), do not even address "contribution." *See, e.g., Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). They involve, instead, persons who sued for direct cost recovery – not contribution. While the Fifth Circuit claims that "[w]hether the cases actually used the word 'contribution' is irrelevant" (Pet. App. 17a), Congress' concern was not with these direct cost recovery decisions, which were nowhere referenced in the legislative history, but rather was with the separate line of cases represented by the two mentioned in the above House Report that had specifically found an implied right of contribution under section 107(a). And *see* cases cited at n.5, *supra*. New Section 113(f)(1) made explicit the implied right of contribution exercisable (as with the implied right) by parties subject to, or who had been subject to, Section 106 or Section 107(a) CERCLA liability. 42 U.S.C. § 9613(f)(1).

This relationship between Sections 107 and 113 has been fully recognized as important to understanding the express right of contribution codified in Section 113(f)(1). As this Court has observed, the two sections work together to enable a party held liable under CERCLA, or involved in a CERCLA action, to seek contribution from other potentially responsible parties. *See Key Tronic*, 511 U.S. at 816 (as amended by SARA, CERCLA "now expressly authorizes a cause of action for contribution in § 113" and "impliedly authorizes a similar and somewhat overlapping remedy in § 107").

Where, for example, a person responsible for contaminating his property *is subjected to CERCLA liability claims*, he may not bring a separate direct cost recovery action against another responsible party under Section 107(a) seeking to impose joint and several liability, *see Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998) (citing cases from other circuits); *Amoco Oil Co. v. Borden,*

Inc., 889 F.2d 664, 672-73 (5th Cir. 1989); *see also* n.29, *infra*, but is limited to pursuing contribution in the underlying CERCLA suit under Section 113(f)(1). This is to be distinguished from the person bearing no responsibility for the contaminated condition of its property, who, *if not subject to CERCLA liability claims*, can bring *only* a direct cost recovery action under Section 107(a), but cannot pursue contribution under Section 113(f)(1). *See, e.g., Rumpke*, 107 F.3d at 1241; *Redwing Carriers*, 94 F.3d at 1496.

Aviall, of course, fits neither category. Having contributed to the contamination of its property (*see* n.1, *supra*), it cannot pursue a direct cost recovery action under Section 107(a). *See* n. 29, *infra* (listing cases). Moreover, since Aviall has never been the subject of a Section 106 or 107(a) civil action, it can assert no right of contribution under Section 113(f)(1). Yet, true to Section 113(f)(1)'s savings clause, whatever other avenues to contribution might be available to Aviall remain "[un]diminish[ed]." It continues to assert state claims for contribution under Texas law, *see* n.12, *supra*. In addition, Aviall could have pursued contribution under Section 113(f)(3)(B) if it had entered into an approved settlement for contribution with a state or federal authority. *See* n.6, *supra*. To our knowledge, this exhausts all rights of contribution Aviall could possibly assert – other than the stand-alone contribution right fashioned by the court below from Section 113(f)(1)'s savings clause which, as discussed herein, itself creates no right of contribution at all.

The error in the Fifth Circuit's analysis is not in failing to acknowledge this interplay between Sections 107(a) and 113, s*ee* Pet. App. 18a-19a, but in refusing to follow the connection through to its necessary conclusion. Thus, the court below creates a free-standing cause of action for contribution that requires no underlying Section 106 or

107(a) liability. Yet, in order for the savings clause in Section 113(f)(1) to operate in this manner, it would have to establish liability on its own – something it decidedly cannot do. *See Locke,* 529 U.S. at 105 (a savings clause creates no substantive rights of its own); *and see* pp. 20-21, *supra*.

Nor can a construction of Section 113(f)(1)'s savings clause to create for Aviall a stand-alone right of contribution be squared with the federal common law. Congress undeniably understood the right of contribution to be based on the common law concept of shared liability among joint tortfeasors, and it intended Section 113(f)(1) to codify that common law.[19] *See United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *see also* pp. 10-12, *supra*. At federal common law, one could not seek contribution unless and until that person had first discharged, pursuant to judgment or settlement, the liability of other wrongdoers against whom contribution was being sought. *See Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 298 (1993) (only those "charged with liability" in a common law suit for contribution under securities laws had a right to contribution); *Texas Indus.*, 451 U.S. at 634 (characterizing contribution as helping "one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim"); *Northwest Airlines*, 451 U.S. at 87-88 (right to contribution "is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability").

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[19] The House Report fully anticipates that "[a]s with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law." H. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862.

This understanding was carried forward in the Restatements. *See* RESTATEMENT (SECOND) OF TORTS § 886A (1979); *and see* RESTATEMENT (THIRD) OF TORTS § 23, cmt. b (2000) ("[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment").[20] Only recently was the Restatement modified in conformance with Section 113(f)(1) to allow a person to sue for contribution *during* the pendency of an underlying action, as well as *after* a judgment or settlement regarding liability. *See* RESTATEMENT (THIRD) OF TORTS § 23, cmts. b, n. (2000); s*ee also* Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 194 (1996).[21]

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[20] BLACK'S LAW DICTIONARY 328 (6th ed. 1990) defines "Contribution" as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear." *See also id.* at 329 (7th ed. 1999).

[21] The original Senate bill that served as a precursor to Section 113(f)(1) provided that contribution could not be sought until after judgment in a Section 106 or 107(a) civil action, reflecting the limitations set forth in the Restatement (Second). *See* S. Rep. No. 99-11 at 103 (1985). The Senate was initially concerned that allowing defendants to implead third parties with contribution claims during a pending cost recovery action would unduly prolong and expand the scope of the underlying litigation. *Id.* at 44. Not until the floor debate on the bill did the Senate add the language "during or following," so that the defendant in the original Section 106 or 107(a) action could implead a third party with a contribution claim while that action was still pending. *See* 131 Cong. Rec. at 24,449-450 (floor amendment adding "during or following" would allow "any defendant in a Government enforcement action under CERCLA" to file a claim against others as soon as enforcement action has been brought) (Sen. Stafford). This amendment brought the Senate bill into conformity with the House bill, which had initially provided that contribution could be sought by "any defendant alleged or held to be liable in an action under section 106 or section 107(a)." H.R. Rep. No. 99-253(I) at 13 (1985). *And see* n. 13, *supra*.

The federal right of action that the Fifth Circuit implanted into Section 113(f)(1)'s savings clause wrenches the right of contribution from its common law roots. Persons (like Aviall) neither adjudged liable, nor even facing liability, for the payment of response costs, and thus heretofore unable to seek contribution, are, under the decision below, now free to pursue contribution in federal court. Thus, removed from the right of contribution is what has long been acknowledged as one of its essential elements – joint underlying liability. *See* 18 AM. JUR. 2D Contribution § 15 (1985) (one is entitled to contribution if the payment made by him was compulsory -- *i.e.*, "the party making it cannot legally resist it" -- under a legal and fixed obligation); RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e ("before there can be contribution between joint tortfeasors there must first of all be joint tortfeasors"); *see also Northwest Airlines*, 451 U.S. at 83 (two principal elements of common law right to contribution are "(1) common liability and (2) the party seeking contribution has been required to pay more than its just share of the award").

Traditionally, one who makes a voluntary payment cannot seek reimbursement from others by way of contribution. *See* 18 AM. JUR. 2d Contribution § 15; RESTATEMENT (SECOND) OF TORTS § 886A, cmt. e (1979) (equity rule provides that contribution "will not be allowed in favor of a volunteer").[22] The reading of Section 113(f)(1) advanced below changes all that, by affording Aviall a right of contribution it simply did not have at federal common

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[22] As previously noted, *see* p. 9-10, *supra*, post-SARA decisions continue to recognize that a person uninvolved in contaminating the property, who voluntarily pays cleanup costs, can bring a direct action under Section 107(a) against the responsible parties, but cannot pursue a Section 113(f)(1) contribution suit. *See, e.g. Rumpke*, 107 F.3d at 1241.

law.[23] To the extent Congress intended so dramatic an overhaul of the federal common law, it was required to do so explicitly. Failing such explicit action, this Court has admonished strongly against judicial endorsements of a rewriting of federal common law by implication. *See Bestfoods*, 524 U.S. at 63.

Indeed, in *Bestfoods*, this Court declined to read into CERCLA Section 107(a) an implied liability for the parent corporation of a PRP that would depart from the common law rule against piercing of the corporate veil. As there explained: "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that 'in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Id.* (*quoting United States v. Texas*, 507 U.S. 529, 534 (1993)). *See also Key Tronic*, 511 U.S. at 809 (rejecting implied right under CERCLA to collect attorneys' fees); *Musick, Peeler & Garrett*, 508 U.S. at 293-96 (court has only "limited" discretion to imply contribution right based on judicially-fashioned implied private right of action under securities laws); *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959) ("'no statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.'") (quoting *Shaw v. Railroad Co.*, 101 U.S. 557 565 (1879); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907)). Here, too, if the federal common law of

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[23] Prior to SARA, federal law afforded no free-standing right of contribution wholly detached from Section 107(a) liability – not even by implication. *See* pp. 22-24, *supra*. Thus, there plainly was no need for the Fifth Circuit to create such a right in order to ensure that it not be "diminish[ed]," 42 U.S.C. § 9613(f)(1), by the statute's enabling clause.

contribution is to be altered so dramatically, that task properly falls to Congress to accomplish through explicit statutory language, not to the circuit courts through an overly broad construction of Section 113(f)(1)'s savings clause.

3. Section 113(f)(1)'s Limited Right of Action is Also Supported By CERCLA's Overall Structure And Scheme

Further support for reading Section 113(f)(1) as enacting only a limited contribution right is found in the other provisions of CERCLA that relate to contribution. For example, Section 113(g)(3) identifies the applicable limitations period for pursuing a right of contribution. This provision allows a contribution action to be brought within three years from the date of judgment or settlement of a Section 106 or Section 107(a) action. 42 U.S.C. § 9613(g)(3).[24] Notably, Section 113(g)(3) identifies no

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[24] Section 113(g)(3) provides:

> No action for contribution for any response costs or damages may be commenced more than 3 years after – (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). This language also applies to contribution suits brought under Section 113(f)(3)(B), with the three years running from the date of the triggering settlement with the government entered into pursuant to CERCLA Section 122, 42 U.S.C. § 9622.

limitations period for contribution suits brought in the absence of either an underlying Section 106 or 107(a) civil action or a governmental settlement. This omission further suggests that Congress intended to create only the conditioned right of contribution set forth in Section 113(f)(1)'s enabling clause and the contribution right included in Section 113(f)(3)(B) for persons entering into approved settlements with government authorities (*see* p. 12, *supra*). *See* 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 47:23, at 306-07 (*expressio unius* principle requires conclusion that excluded language was omitted intentionally). If Congress had intended to create a "savings clause contribution claim," it is safe to presume that it would have crafted a limitations period to match.

Some appellate courts, and the *en banc* majority below (Pet. App. 30a), have attempted to fill this void by substituting the limitations' period of six years separately established by Congress in Section 113(g)(2) (42 U.S.C. § 9613(g)(2)) for Section 107(a) cost recovery actions.[25] *See, e.g.*, *Centerior Serv. Co*, 153 F.3d at 355; *Sun Co.*, 124 F.3d at 1192-93. This, however, is plainly *not* the limitations' period prescribed by Congress for federal contribution actions, nor the one contemplated by the statutory scheme that Congress devised for these purposes. If the decision below is allowed to stand, the discrepancy as to when a Section 113(f)(1) contribution action must commence will persist. Those suits seeking contribution under Section 113(f)(1)'s enabling clause – *i.e.*, "during or following" the filing of a Section 106 or 107(a) suit – will be held to a three-

[25] Section 113(g)(2) provides: "[a]n initial action for recovery of the costs referred to in section [107] of this title must be commenced . . . (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . ." 42 U.S.C. § 9613(g)(2)(B).

year statute of limitations, while those suits "brought" under the savings clause will ostensibly enjoy a more lenient six-year statute of limitations. Nothing in SARA's history or text remotely suggests that Congress intended such disparity.

Allowing Section 113(f)(1) contribution actions in the absence of a pending or concluded civil action under Sections 106 or 107(a) also undermines Section 113(f)'s "comprehensive scheme" to encourage early settlement of Section 106 or 107(a) suits. *See In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997); *United States v. Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996) (describing scheme). When the federal government, or a state, brings suit against one or more PRPs under Sections 106 or 107(a), Section 113(f)(2) (42 U.S.C. § 9613(f)(2)) protects those who settle early from future contribution claims.[26] *See, e.g., In re Reading*, 115 F.3d at 1119. PRPs who refuse to settle are, on the other hand, subject to potentially disproportionate liability, as they cannot seek contribution from the settling parties. *Id.*; *see also United Techs. Corp.*, 33 F.3d at 103. Section 113(f) was thus "'designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.'" *United Techs. Corp.*, 33 F.3d at 103 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990)); *see also* H.R. Rep. No. 99-253(I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862.

By allowing Section 113(f)(1) contribution claims in the absence of an underlying Section 106 or Section 107(a)

[26] Section 113(f)(2) provides, in pertinent part: "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide . . . ." 42 U.S.C. § 9613(f)(2).

civil action, the Fifth Circuit majority exposes all defendants named in such "savings clause claims" to the very real prospect of multiple, inconsistent liability should the government (or a private party) thereafter pursue any or all of them under Section 106 or Section 107(a). *See* Brief for the United States as Amicus Curiae at 15 n.9. This follows, necessarily, because neither an ordered contribution payment in the private suit first brought, nor a settlement with said private plaintiff who claimed to have engaged in a voluntary cleanup, provides Section 113(f)(2) contribution protection.[27] Thus, the Fifth Circuit's overly expansive reading of Section 113(f)(1)'s "savings clause" not only seriously undercuts CERCLA's objective to have cleanup costs appropriately allocated among joint tortfeasors, *see United Techs. Corp.*, 33 F.3d at 102-03, but also takes out of play the "contribution protection" that Section 113(f)(2) affords liable parties upon settlement of a government suit under the enabling clause.[28]

This same concern was integral to the First and Third Circuit's determinations that responsible parties may not assert Section 107(a) cost recovery actions against other responsible parties, but instead must seek contribution under

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[27] For example, a defendant alleged to be liable for only a portion of the cleanup costs, in a contribution suit brought pursuant to Section 113(f)(1)'s savings clause, could still be held jointly and severally liable for all cleanup costs in a later suit by the government. The government in the later suit could then assert that the cleanup for which contribution had been sought and obtained in the private "savings clause" action was in some respects deficient or inadequate, and pursue duplicative costs to repeat the initial work that was poorly done by another party.

[28] Similarly, the availability of a free-standing right of contribution under Section 113(f)(1)'s savings clause renders largely superfluous Section 113(f)(3)(B), which allows a right of contribution only after settlement of an action brought by the government. *See also* p. 12, *supra*.

Section 113(f)(1).[29] In *In re Reading*, 115 F.3d at 1119, the Third Circuit observed:

> If a party could end run § 113(f)(2) and (3) by suing a settling party under § 107(a)(4)(B) for "costs of response," the settlement scheme would be bypassed. The incentive to early settlement would disappear, and the extent of litigation involved in a CERCLA case would increase dramatically. Consent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses.

See also United Techs. Corp., 33 F.3d at 103 (settlement-encouraging mechanism would be "gutted" by allowing private parties who contributed to the contamination to maintain Section 107(a) cost recovery actions against other potentially responsible parties prior to any government assessment of CERCLA liability). As the dissent below noted (Pet. App. 41a n.41), allowing a private suit for contribution under Section 113(f)(1)'s savings clause, without a predicate finding of CERCLA liability against the plaintiff, would be equally disruptive of the statute's overall settlement scheme.

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[29] Every court of appeals considering the issue, including the Fifth Circuit, has held that parties who contribute to property contamination (like Aviall) are prohibited from pursuing direct cost recovery claims under Section 107(a). *See, e.g., Bedford Affiliates*, 156 F.3d at 423-24 and cases cited therein; *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989). *And see* n. 1, *supra*.

C. Reading Section 113(f)(1) As A Conditioned Grant Of Contribution Is Fully Consistent With CERCLA's Policies

As we have already discussed, the central purpose behind enactment of Section 113(f)(1) was to codify in SARA a federal right of contribution like the one some lower courts had theretofore implied, enabling persons liable for response costs under Sections 106 or 107(a) of CERCLA to join or otherwise pursue other joint tortfeasors in an action for contribution. *See* pp. 22-25, *supra*. Keeping faith with the "during or following" requirement in the provision's enabling clause fully serves that purpose. For the reasons previously discussed, the same cannot be said for the more open-ended interpretation of the statutory provision urged by respondent and the *en banc* majority below.[30]

Nonetheless, respondent and the Fifth Circuit suggest that, by embracing a conditioned right of federal contribution under Section 113(f)(1), voluntary cleanups will be discouraged (Pet. App. 31a), contrary to CERCLA's broad policy "to promote prompt and effective cleanup of hazardous waste sites." *Id.* at 14a. We have, however, been unable to discern any policy that Congress anywhere tied enactment of the original statute to a policy favoring voluntarism.[31] Yet, even if, as the Fifth Circuit seems to

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[30] To read Section 113(f)(1) as enabling persons to pursue contribution claims against other parties in the absence of a pending or adjudged Section 106 or Section 107(a) suit neither comports with federal common law (pp. 27-29, *supra*), ensures a fair allocation of costs among joint tortfeasors (pp. 16-17, *supra*), encourages early settlements (pp. 33-35 *supra*), protects against multiple and conflicting recoveries (p.34, *supra*), nor holds similar claims of contribution to like limitations' periods (pp. 31-33, *supra*).

[31] Not until after CERCLA was passed did the EPA, in 1984, even express a policy interest in removing or minimizing "the impediments to voluntary clean-up." *See* Lee Thomas and F. Henry Habicht II, U.S. EPA, Interior CERCLA Settlement Policy (OSER Dir. No. 9835.0) (1984).

suggest (Pet. App. 31a), it could be maintained that such a policy might be lurking *sub silentio* behind CERCLA's recognized twin purposes of promoting the cleanup of hazardous waste sites and imposing on those parties responsible the costs needed to rid the site of contamination, it is abundantly clear that, whatever the policies underlying enactment of CERCLA, Congress plainly did not at the time regard a right of contribution (in any form) as essential to the furtherance of those policies. Accordingly, the suggestion that a grant in SARA – of a conditioned, rather than a wholly unconditioned, right of contribution – somehow disserves CERCLA's intended cleanup purposes seems more of a judicial afterthought than a legislative deliberation. Surely, if CERCLA's cleanup policies can be perfectly well served with no right of contribution at all (except as provided at common law) – as was the case when Congress first enacted the statute in 1980 (*see* p. 10 *supra*) – then SARA needs to add no greater right of contribution than what is, in essence, the statutory equivalent of the common law contribution right to ensure that those policies will continue to be equally well served. This is, we submit, exactly what Section 113(f)(1) both does and was intended to do. *See* pp. 13-25, *supra*.

The argument from respondent and the *en banc* majority below, that only a more expansive right of contribution will do, is thus neither legislatively compelled nor logically persuasive. As observed by the United States in its *amicus* brief urging that certiorari be granted, "there is no evidence in the record of this case to support the court of appeals' assumption (Pet. App. 31a) that the availability of a contribution action in the absence of a Section 106 or 107(a) suit is critical to encouraging . . . [voluntary] cleanups."

Brief for the United States as Amicus Curiae at 15 n.9. This is not to suggest, of course, that such encouragement is of no interest to Congress. Rather, there is simply no indication that Congress intended Section 113(f)(1) to advance such any agenda. Only later did it address that interest by passing the Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. 107-118, Tit. II, 115 Stat. 2356 (2002). Unclean sites not placed on the National Priorities List – which essentially targets the worst of the hazardous waste locations for federal intervention under CERCLA, *see Exxon Corp. v. Hunt*, 475 U.S. 355, 374 (1986), – are subject to EPA, state, and local oversight pursuant to federal and state "brownfields" programs.[32] These programs are designed to facilitate voluntary, privately funded cleanups with minimal formal governmental involvement. *See* Northeast-Midwest Institute, Brownfields: State of The States (Nov. 2001). The legislation enacted in 2001 openly endorses these programs and includes measures to support and expedite the cleanup process that they foster. *See generally* S. Rep. No. 107-2 (2001).

Nothing in CERCLA undermines this congressional scheme. To the contrary, viewing the final sentence in Section 113(f)(1) as simply a savings clause designed to preserve "[un]diminish[ed]" state law rights of contribution, ensures that persons in Aviall's shoes, upon electing to address contamination voluntarily can, indeed, pursue other PRPs for contribution in available state court actions. *See* pp. 17-19 *supra*. Perhaps the ultimate irony is that, if the Fifth Circuit's more expansive reading of Section 113(f)(1)'s

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[32] The EPA's Brownfields Initiative is designed to provide a federal imprimatur on state voluntary cleanup programs of sites not on the National Priorities List or other sites of no federal interest. *See* Environmental Protection Agency, "Interim Approaches for Regional Relations with State Voluntary Cleanup Programs" at 1, Nov. 14, 1996.

final sentence prevails, this same opportunity may well be forever lost. Under such a construction, Section 113(f)(1), unconditioned, would presumably occupy the field, preempting the very state law contribution claims that the provision's concluding sentence was intended to save.[33] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing *Locke*, 529 U.S. at 110).

That is not the federal right of contribution Congress undertook to add to CERCLA in the SARA amendments. Rather, Section 113(f)(1)'s enabling language is explicit in its limitation of a right of contribution to those persons who are facing liability for response costs in a Section 106 or Section 107(a) civil action that is already underway or has concluded. *See* pp. 13-15, *supra*. This explicit limitation codifies the implied right of contribution that had been originally engrafted onto Section 107(a) of CERCLA by some district courts in keeping with the traditional contribution principles found in federal common law. *See* n.5, pp. 27-29, *supra*. By providing, in Section 113(f)(1)'s final sentence, that this new right of contribution shall diminish no others, Congress saved whatever contribution

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[33] By contrast, a reading of Section 113(f)(1) that limits the federal right of contribution to suits brought "during or following" Section 106 or Section 107(a) civil actions would, as the Seventh Circuit has recognized, preempt only those state rights of contribution in direct conflict with that federal right, but would not otherwise interfere with a party's right to pursue contribution under state law. *See PMC v. Sherwin Williams Co.*, 151 F.3d 610, 617-18 (7th Cir. 1998) (Section 113(f)(1) preempted Illinois contribution statute only insofar as the state statute would have nullified CERCLA's requirement of consistency with the National Contingency Plan). *And see Bedford Affiliates*, 156 F.3d at 425-27 (Section 113(f) preemption is limited to those common law restitution and indemnification actions that would allow bypass of CERCLA scheme favoring settlements); *In re Reading*, 115 F.3d at 1119-20 (same).

rights were otherwise available under state and federal law. *See* pp. 17-19, *supra*.

It is, of course, the statute's text that best informs Congressional intent. *See Lamie,* 124 S. Ct. at 1030 ("[t]he starting point in discerning congressional intent is the exiting statutory text") (citing *Hughes Aircraft Co.*, 525 U.S. at 438); *Pavelic & Le Flore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (the judiciary's task is "to apply the text, not to improve upon it"); *Ron Pair Enters.*, 489 U.S. at 240 ("'[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.'"); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (same). Here, not only SARA's language, but also its essential purpose, demands the reading of Section 113(f)(1) urged by petitioner. This reading neither conflicts with nor contravenes the dual policies underlying CERCLA. *See* pp. 36-39, *supra*. Accordingly, reversal of the Fifth Circuit's more expansive view of the legislation is required.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and Aviall's case dismissed.

Respectfully submitted.

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FEBRUARY 2003

Supreme Court, U.S.
FILED
APR 8 2004
OFFICE OF THE CLERK

No. 02-1192

IN THE
Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether a responsible party may bring an action for contribution under section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f), in the absence of a prior or pending federal civil action brought under sections 106 or 107 of CERCLA.

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STATEMENT OF THE CASE

A. Statutory Background.

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601-9675 (2000), ("CERCLA" or "Act"), enacted in 1980, addresses the problem of real property contaminated by hazardous substances. The Act provides the federal government with powerful mechanisms to ensure the clean-up of such properties. First, § 104, 42 U.S.C. § 9604, authorizes the federal government to undertake response actions itself. Those actions may be financed by a federal fund, known originally as the Hazardous Substances Superfund, 42 U.S.C. § 9611, and the federal government may sue a broad class of "potentially responsible parties" to recoup its "response costs," 42 U.S.C. § 9607(a)(4)(A). Second, Congress gave the federal government the authority to compel private parties to undertake response actions themselves. Under § 106(a), 42 U.S.C. § 9606(a), the government may initiate a civil action in federal district court to compel a clean-up, or, alternatively, may issue an administrative order compelling a clean-up.

Congress also authorized private parties to recover their own response costs. Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), provides a federal cause of action that allows "any other person" who undertakes a response action to recover costs from any entity potentially responsible for the contamination (often referred to as a "potentially responsible party," or "PRP").

1. In the years immediately following CERCLA's adoption, there was considerable litigation to define the contours of the Act. By 1986, however, at least one principle was well-established: § 107 provided PRPs who undertook voluntary clean-ups with a cause of action against other PRPs who had contributed to the contamination. The fact that the suing entity was itself a PRP did not take it outside the scope of § 107. *See, e.g., City of Philadelphia v. Stepan Chem.*

Co., 544 F. Supp. 1135 (E.D. Pa. 1982); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984); *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290 (N.D. Cal. 1985). Nor – most important here – did it matter that a PRP acted voluntarily in cleaning up a site; government involvement in private clean-ups was not required before a PRP could recover under § 107. *See, e.g., Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (allowing cost recovery by PRP in the absence of any government order or lawsuit); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987) (PRP who "voluntarily pays CERCLA response costs" may bring action for cost recovery); *Artesian Water Co. v. New Castle County*, 605 F. Supp. 1348 (D. Del. 1985).

A question remained regarding the mechanism for apportioning costs among PRPs. Under § 107, each PRP was potentially liable for the entire cost of a clean-up, under "joint and several liability" principles. *See, e.g., United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983). To allow for a more equitable apportionment of costs, a series of court opinions held that CERCLA contained an implied right to contribution, to be developed pursuant to a uniform, federal common law. *See Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).[1] Reviewing this history, the Court stated:

> In its original form CERCLA contained no express provision authorizing a private party that incurred cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute – particularly the § 107 provisions outlining the liabilities and defenses of persons against whom the government may assert claims – to impliedly authorize such a cause of action.

[1] Some courts found the right of contribution arose from federal common law. *See, e.g., Artesian Water Co. v. New Castle County*, 642 F. Supp. 1258, 1265-68 (D. Del. 1986). Other courts found an implied right of contribution in § 107 of CERCLA. *Wehner*, 616 F. Supp. at 31. This latter view was apparently the position of the Department of Justice. *Id.*

> cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute – particularly the § 107 provisions outlining the liabilities and defenses of persons against whom the government may assert claims – to impliedly authorize such a cause of action.

Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994) (footnote omitted).

2. Due in part to this Court's decisions in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77 (1981), concerns arose about the authority of federal courts to find an implied cause of action in a federal statute such as CERCLA. Congress responded by amending CERCLA to provide for an express right of contribution. In the 1986 Superfund Amendment and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA"), Congress provided:

> Any person may seek contribution from any other person who is liable or potentially liable under [§107(a)] of this title, during or following any civil action under [§106] of this title or under [§107(a)] of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§106] of this title or [§107] of this title.

42 U.S.C. § 9613(f)(1) (2000). Congress also expressly authorized a right of contribution following "an administrative or judicially approved settlement" with the EPA. *Id.* at § 9613(f)(3)(B).

The legislative history on § 113(f) is limited. It acknowledges both the growing body of case law finding an implied right of contribution and the uncertainty regarding federal courts' authority to establish such implied rights. The legislative history also indicates that the purpose of section 113(f) was to "clarify" and "confirm" the right of contribution that existed prior to the adoption of SARA. H.R. Rep. No. 99-253, pt. I, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

3. As amended by SARA, CERCLA contained both the original cause of action for contribution established by § 107 and the express right of contribution recognized by § 113(f). *See Key Tronic*, 511 U.S. at 816 (describing "similar and somewhat overlapping remedies"). Courts were thus required to "allocate" the cause of action available to PRPs between the two sections: were PRPs seeking cost recovery from other PRPs entitled to sue under § 107, under § 113, or both?

The answer was important for two principal reasons. First, allocation of the cause of action would have implications for PRPs who settle with the government. Under § 113(f)(2), a settling party receives protection from actions for "contribution" by non-settling PRPs, intended to provide an incentive to settle with the government. If PRPs could bring an independent claim under § 107, then the contribution protection offered by § 113 would be rendered largely meaningless. *See United Techs. Corp. v. Browning-Ferris*, 33 F.3d 96, 102 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *United States v. Colorado & E.R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995). Even more fundamentally, the degree

to which PRPs may recover could be different under the two sections. Courts were concerned that a § 107 cause of action would entitle PRPs to a full recovery of all of their response costs, under joint and several liability rules, rather than to the equitable share provided for by § 113. *See, e.g., New Castle Co. v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121-22 (3d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

Without exception, the federal courts of appeal resolved the "allocation" issue in favor of § 113, holding that PRPs may sue each other for apportionment of costs under § 113 and only under § 113.[2] The reasoning of the courts was as uniform as the result: PRPs must sue for "contribution" under § 113 because the very nature of their claim, one for an equitable allocation of costs among jointly liable parties, is inherently or quintessentially a claim for contribution. The end result was a uniform and clear structure for private cost-recovery claims under CERCLA. Non-PRPs – "innocent" landowners who did not contribute to contamination on their property – could sue for full cost recovery under § 107. But parties who were in part responsible for contamination – PRPs – were limited to actions for contribution under § 113, where they would benefit from "contribution protection" if they settled with the government but recover only an equitable portion of their response costs.

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[2] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 423-25 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), *cert. denied*, 525 U.S. 963 (1998); *Pinal Creek Group*, 118 F.3d at 1301; *New Castle County*, 111 F.3d at 1121-23; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *Colorado & E.R.R.*, 50 F.3d at 1534-36; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

B. Factual Background and Proceedings Below.

This case is about the right of a property owner, respondent Aviall Services, Inc. ("Aviall"), to recover an equitable share of its clean-up costs from the property's prior owner, petitioner Cooper Industries, Inc. ("Cooper"). As outlined above, actions such as this one have been brought routinely in the many years since CERCLA was adopted. And the settled right of a PRP to seek contribution from another PRP was the background against which the transaction in this case was undertaken.

1. Petitioner Cooper owned and operated several aircraft engine maintenance facilities in Texas. During the time Cooper operated the property, petroleum and other hazardous substances were released into the soil and groundwater. In 1981 Cooper sold the facilities to Aviall, which operated the facilities until it sold them in the mid-1990s. While Aviall owned the property, petroleum and hazardous substances apparently continued to leak into the soil and groundwater through underground storage tanks and spills.

Aviall discovered hazardous substances in the soil and groundwater on several occasions during the early 1990s. Each time, Aviall reported the discovery to the Texas environmental regulatory agency as required by Texas law. The State of Texas directed Aviall to clean up the properties, under threat of issuing an administrative order, and Aviall did so under the State's supervision.[3] Aviall has spent in excess of five million dollars to conduct its investigation and remediation activities.

[3] *See* R. 144-49, 1454-55, 1462-64, 1496-97, 1505-06, 1522-23. Petitioner's description of Aviall's activities as "voluntary" ignores the role the State played in compelling the clean-up.

2. In August 1997 Aviall filed this action against Cooper in the United States District Court for the Northern District of Texas, seeking to recover the share of its clean-up costs fairly charged to Cooper. J.A. 8A. In its original complaint, Aviall sought recovery of its costs under several causes of action, including § 107 and § 113 of CERCLA. J.A. 16A. Aviall later amended its complaint to add new state law claims, drop several common law claims, and combine its CERCLA claims into one, joint claim. J.A. 41A.[4]

Both parties filed motions for summary judgment. The district court granted Cooper's motion. The court read § 113 to allow an action for contribution only during or after a civil action under CERCLA. Pet. App. 90a. Because Aviall's clean-up was not undertaken pursuant to a CERCLA suit, the court reasoned, Aviall could not maintain its contribution action. *Id.* at 97a. A divided panel of the Fifth Circuit affirmed, on substantially the same reasoning. *Id.* at 47a.

3. On rehearing, the *en banc* court reversed and held that Aviall could pursue its contribution action. Pet. App. 9a. In an opinion written by Judge Edith Jones, the Court of Appeals held that § 113, which provides that a party "may" seek contribution during or following any civil action, does not by its terms preclude a contribution action in other circumstances. Rather, use of the permissive "may" reflects congressional intent to permit contribution actions in the absence of civil suits. *Id.* at 24a. Similarly, § 113's "savings clause," which provides expressly that "nothing in this sub-

[4] Despite certain references in the district court opinion and the arguments of petitioner, Aviall never abandoned its § 107 claim. J.A. 92A – 94A. Aviall framed its claim in the manner compelled by the Fifth Circuit's decision in *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001), which interpreted a PRP's cost-recovery action as arising jointly through the operation of sections 107 and 113.

section shall diminish the right of any person to bring an action for contribution in the absence of a civil action" under CERCLA, indicates that Congress did not intend to foreclose contribution actions brought by parties who have undertaken clean-ups without first litigating the issue. *Id.* at 25a. Finally, the Court of Appeals noted that its construction of § 113 was consistent with the purposes underlying CERCLA as a whole, in that it would "promote prompt and efficient cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions created the hazards." *Id.* at 14a.

SUMMARY OF ARGUMENT

For the past twenty five years, CERCLA has been a central component of this nation's approach to the clean-up of contaminated property. Business arrangements and real estate transactions have been fashioned around a uniform understanding of CERCLA – an understanding that, regardless of the vagaries of state law, CERCLA establishes a cause of action for cost recovery by parties who undertake clean-ups – whether they do so voluntarily, under state or federal order, or following settlement with the government. That has been the position of the federal courts of appeals, and the understanding underlying countless business transactions.

Now, a quarter century after enactment of CERCLA and almost eighteen years after adoption of the provision at issue in this case, petitioner urges upon the Court a brand new reading of CERCLA. Under petitioner's view, § 113 precludes a right of contribution by a PRP who either voluntarily or in response to a state or federal order cleans up contaminated property. Indeed, petitioner goes one step further than that: such PRPs are not only foreclosed from recovering under § 113 but are also left without any right to cost recovery under CERCLA. That novel position is not supported by the language, legislative history, or structure of the

Act. Adoption of petitioner's position would disrupt the most basic and settled understanding of the operation of CERCLA.

1. Section 113 expressly authorizes a right of action for "contribution." As the courts of appeals have uniformly held, an action by a PRP who cleans up contaminated property – whether voluntarily, under government direction, or pursuant to litigation – and seeks partial recovery from another PRP is a "quintessential" claim for contribution and thus falls squarely within § 113. Were it otherwise, there would be no basis for what is now the well-settled proposition that PRPs must sue for contribution under § 113 rather than seeking recovery under § 107.

By its terms, § 113 permits actions by PRPs who conduct clean-ups voluntarily or pursuant to administrative order. Though Congress specified certain common situations in which a contribution action can be expected – during or after CERCLA litigation – it also expressly stated that the right to bring an action at other times was not curtailed. The straightforward reading adopted by the court below simply takes Congress at its word.

Petitioner's contrary reading, on the other hand, requires significant alteration of the statutory language. "May" becomes "may only," and the savings clause is rewritten to apply only to state law – which would itself pose difficult and, for this Court, novel questions of CERCLA preemption. Petitioner's reading is also contrary to the long-standing position of the Department of Justice ("DOJ" or "Justice"). Despite the fact that the Solicitor General has entered this case as *amicus* in support of petitioner, DOJ in the past has read the statute just as respondent and the Fifth Circuit do: use of the permissive "may" in the first sentence, combined with the savings clause in the last, make clear that a PRP may sue

for contribution whether or not the clean-up was the subject of CERCLA litigation.

2. Petitioner's reading of § 113 is inconsistent with the congressional purpose behind CERCLA. Through CERCLA, Congress intended to encourage voluntary clean-ups of contaminated properties. But on petitioner's reading, PRPs have a decided *disincentive* to act voluntarily: only if they resist voluntary action and provoke court action can they recover any of their costs from entities partially responsible for the contamination. Petitioner's position also would effectively immunize responsible parties from any liability for their equitable share of costs once some other PRP had voluntarily cleaned up a site, contrary to Congress' intent. Finally, petitioner's arguments are utterly inconsistent with one of the main purposes of CERCLA: to establish a uniform, national policy of liability.

Petitioner's reading also runs contrary to decades of settled case law, finding a cause of action for contribution under CERCLA for PRPs who have engaged in clean-ups either voluntarily or at the direction of administrative orders, and is in tension with regulations of the Environmental Protection Agency. And as noted above, it conflicts with the traditional position of DOJ. All of these authorities have generated settled expectations in the business community that would be badly undermined were the Court to adopt petitioner's novel theory.

3. If this Court were to hold that respondent has no cause of action under § 113, then the Court should remand to allow respondent to proceed under its § 107 claim. There is no merit to petitioner's contention that Aviall has somehow waived that claim. And if respondent is correct that PRPs like Aviall cannot bring an action for contribution under § 113, then it follows that those PRPs are entitled to recover under § 107 instead.

ARGUMENT

Petitioner's argument – that CERCLA precludes recovery of an equitable share of costs by a PRP who cleans up contaminated property either voluntarily or pursuant to an administrative order – is virtually unprecedented. No federal court of appeals has ever adopted that position – with the exception of the Fifth Circuit panel below, which was of course promptly reversed by the *en banc* court of appeals. Indeed, this case is the first in which a court of appeals has even *addressed* petitioner's novel position. As demonstrated by the numerous amicus briefs filed in this case, on behalf of parties ranging from the American Petroleum Institute to the State of New York to environmental organizations, petitioner's argument is not only incorrect but also deeply destructive to the system for assigning liability under CERCLA that has been well-established and smoothly functioning in the lower courts for years.

I. CERCLA § 113 AUTHORIZES RESPONDENT TO SEEK CONTRIBUTION.

A. Respondent's Claim Is A Quintessential Claim For Contribution.

Section 113 expressly authorizes parties to seek "contribution" from other liable parties. That is exactly what respondent Aviall is doing here. One jointly liable party, who has properly cleaned up contaminated property under state compulsion, is seeking an equitable allocation of costs with another jointly liable party. That scenario satisfies the common understanding of "contribution" – the understanding that has led the courts of appeals to hold uniformly that PRPs may sue under § 113's "contribution" action and *only* under § 113, rather than seeking full cost recovery under § 107.

1. This Court defined the essential elements of a claim for contribution in *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 87-88 (1981):

> Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.

The situation described by the Court is precisely the circumstance that exists when one PRP, jointly and severally liable with other PRPs, cleans up property and seeks to share the cost with another jointly liable party.

Contrary to petitioner's argument, a formal court adjudication of liability is not a prerequisite to an action for contribution at common law. Rather, a claim for contribution by a PRP in the absence of a judgment or settlement is consistent with general tort principles. The Restatement (Second) Of Torts addresses the issue directly, clarifying that "when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, *even though judgment has not been recovered against all or any of them*." RESTATEMENT (SECOND) OF TORTS § 886A (1979) (emphasis added); *see also id.* at cmt. b ("the rule stated applies . . . in favor of a tortfeasor who has paid more than his equitable share . . . without any judgment or even suit against him"). Other authorities, though less explicit, also suggest that a claim for contribution may proceed without a judgment or settlement. *See* BLACK'S LAW

DICTIONARY 329 (7th ed. 1999) (defining "contribution" as a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) ("right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability").

Indeed, the Department of Justice has in the past taken the position that a right to contribution may accrue in the absence of a formal adjudication of liability. In its brief in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) ("*Centerior* Br."),[5] the Department explained:

> Every circuit court deciding this issue has held that CERCLA suits among PRPs are in the nature of an action for contribution, regardless of how the action is labeled. That plaintiffs have not formally admitted liability or otherwise been adjudged liable does not alter the conclusion that plaintiffs are limited to a contribution action.

Centerior Br., App. 8A. And in a brief to this Court opposing certiorari in *Pinal Creek Group v. Newmont Mining Co.*, 524 U.S. 937 (1998), the Solicitor General argued that a PRP who voluntarily cleaned up property could sue in contribution under § 113, and relied on the uniform circuit court authority holding that such actions by PRPs are inherently actions for contribution. Brief for the United States as Amicus Curiae (*Pinal* Br.), 1998 WL 34103033 at *7, *15.[6]

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[5] Because the *Centerior* Brief is not readily available on line, a copy is attached to this brief as an Appendix ("App").

[6] In its amicus brief in this case, the Solicitor General does not discuss what appears to be a fairly substantial change in position, beyond a single and rather cryptic reference to the possibility of "errant" language in

2. The federal courts of appeals have universally held that an action by one PRP against another to recover clean-up costs under CERCLA is a "quintessential" claim for contribution. *See Bedford Affiliates*, 156 F.3d at 423-24 (claim by PRP to recoup portion of costs exceeding its equitable share of overall liability is "quintessential claim for contribution").[7] That authority includes cases in which the PRP in question had engaged in wholly *voluntary* clean-up activities. *See Pinal Creek Group*, 118 F.3d at 1298; *Control Data Corp. v. S.C.S.C. Corp.*, 53 F. 3d 930, 932 (8th Cir. 1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989).

As discussed earlier, those cases go on to hold that because any claim by one PRP against another is necessarily a "contribution" claim, PRPs not only *may* sue under § 113, but indeed *must* sue under § 113 instead of under § 107's cost-recovery provisions. Petitioner's position (and the current position of the Solicitor General) is of course inconsistent with that consensus view: if a right to contribution does

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earlier DOJ briefs. Brief for the United States as Amicus Curiae Supporting Petitioner ("SG Br.") at 26. When it asked for examples, respondent was advised that the Solicitor General was aware of no specific case in which the Department had taken a contrary position or used "errant" language.

[7] *See also Centerior Serv. Co.*, 153 F.3d at 349; *United Techs. Corp. Inc.*, 33 F.3d at 101 (responsible parties seeking recovery of portion of their response costs from other responsible parties were seeking contribution within the common understanding of the term); *Redwing Carriers, Inc. v.*, 94 F.3d at 1496 (claim by a PRP is a claim for contribution); *Akzo Coatings Inc.*, 30 F.3d at 764 (precluding PRP from seeking cost recovery claim and noting that action in which party liable for some of the site contamination sought costs from other liable parties is a "quintessential claim for contribution"); *In re Reading Co.*, 115 F.3d 1111, 1121 (3d Cir. 1997) (to the extent the aim of action is cost recovery by one PRP from another, it is an action for contribution).

not exist in the absence of a lawsuit or settlement, then at least as to a significant subset of PRPs, there is no longer any rationale for insisting that they sue under § 113 and for thus *precluding* suits under § 107. If adopted, petitioner's argument would disrupt the established view of the relationship between sections 107 and 113 and necessarily revive an independent claim by PRPs under § 107.

3. The contrary authorities cited by petitioner and the Solicitor General, Pet. Br. at 16-17, SG Br. at 17-19, suggest, at most, that a common law right of contribution might not exist following a wholly gratuitous payment which does not discharge or extinguish the underlying liability of a joint tortfeasor. Under those circumstances, it is argued, the joint tortfeasor against whom contribution is sought might be subject to double liability. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 23 cmt. b (if initial payment by party seeking contribution has not discharged liability of joint tortfeasor, "the person against whom contribution is sought would be subject to double liability") (cited in SG Br. at 18). But even if that were so, it would not support petitioner's position in this particular case, or foreclose an action for contribution by Aviall.

First, petitioner's position is that § 113 precludes actions for contribution by PRPs, like Aviall, who clean up property in response to state or federal orders. Such clean-ups cannot in any sense be seen as gratuitous; rather, they are undertaken under compulsion. Indeed, no clean-up by a PRP should be seen as purely voluntary or gratuitous because, even in the absence of an order, a PRP by definition exists under a cloud of potential liability.

Second and more importantly, a clean-up by a PRP, whether voluntary or in response to a government order, does effectively extinguish the underlying liability of other PRPs with respect to that clean-up. The fear of additional or

"double" liability arises only if the initial clean-up is inadequate, so that the government must insist on additional clean-up activities (or undertake them itself and then seek reimbursement). But with limited exceptions, privately expended clean-up costs qualify as recoverable damages only if they are consistent with the National Contingency Plan ("NCP"), 42 U.S.C. § 9607(a)(4)(B), which requires that private parties satisfy procedural and substantive requirements to produce a "CERCLA-quality cleanup," 40 C.F.R. § 300.700(c)(3)(i) (2003). As a result, cases in which PRPs may seek recovery of costs necessarily involve clean-ups that are of "CERCLA-quality" and entirely adequate, giving the government no reason to impose additional obligations on anyone.[8]

The Department of Justice has argued in the past that a clean-up in response to a government order "discharges" liability and thus justifies contribution. *Centerior* Br., App. 33A-35A.. But under the carefully worked out NCP system, the result is the same whenever a private party conducts a clean-up that is substantially consistent with the NCP.

B. The Text of Section 113 Permits An Action For Contribution By PRPs Like Aviall.

If, as uniformly held by the courts of appeals, an action by a PRP is inherently an action for contribution, then the only remaining issue is whether Congress intended, through the language of § 113(f)(1), to restrict the rights of PRPs to seek contribution – to make the right to contribution *narrower* than it was under prior law. Nothing about the language of § 113 suggests, let alone commands, that result.

[8] As the EPA has explained, "EPA believes that the [NCP] requirement that private party responses comply with all applicable Federal, State and local requirements, including permit requirements, as appropriate, is sufficient to deter poorly planned cleanup proposals and minimize the possibility of independent private party and government responses." 50 Fed. Reg. 47,912, 47,934 (1985).

Instead, § 113(f)(1) is plainly and sensibly read to mean exactly what it says. A PRP "may" seek contribution "during or following" a "civil action" under CERCLA. With that sentence, Congress identified a common situation giving rise to contribution claims by PRPs, and confirmed the validity of pre-SARA case law finding a right of contribution in those circumstances. But that specific endorsement does not restrict the right to seek contribution in other circumstances: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [CERCLA]." As the *en banc* court held, "[T]he first and last sentences of § 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups." Pet. App. 27a.

1. Section 113(f)(1) provides that contribution "may" be sought "during or following any civil action" under CERCLA. Petitioner would read that provision as establishing the exclusive time in which actions for contribution must be brought. But as the *en banc* court of appeals concluded, that reading would revise the statute so that "may" becomes "may only." Pet. App. 24a. The more obvious interpretation of the permissive "may" is that Congress allowed a right of contribution during or after a civil action but did not intend to *limit* that right to such circumstances. *Id.*; *see also* BLACK'S LAW DICTIONARY 993 (7th ed. 1999) (defines primary meaning of "may" as "is permitted to" and states: "This is the primary legal sense – usu. termed the 'permissive' or 'discretionary' sense."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993) (defining "may" as having permission or the liberty to do something).

In prior cases, the Department of Justice has read § 113(f)(1) in just that manner:

> The plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under § 106.

Centerior Br., App. 32A (arguing that action for contribution may be brought in absence of civil action under CERCLA) (emphasis in original). The fact that the statutory language appeared to Department of Justice to be wholly *permissive* in the *Centerior* case is difficult to reconcile with any claim that the statutory text is so "plain" that it admits of only one – entirely contrary – reading today.

If, as petitioner argues, the word "may" is read to mean "may only," then it follows that actions for contribution may not be brought when clean-ups are undertaken in compliance with federal or state administrative orders. Section 113(f)(1) allows actions for contribution "during or following any *civil action*," and an administrative order is not a "civil action."[9] Such a restriction on the scope of contribution is inconsistent with over twenty years of settled lower-court precedent and the traditional position of the Department of Justice, *see Centerior* Br., App. 8A-9A. It is also inconsistent with the

[9] Though petitioner appears to fully embrace this position, the original Fifth Circuit panel, which otherwise ruled for petitioner, could not accept this conclusion. Instead, it revised § 113(f)(1) so that "civil action" became "civil action or administrative order." Pet. App. 97a. The dissenters to the *en banc* decision below rejected that creative rewriting of the statute, and acknowledged that a right of contribution would exist in cases involving administrative orders only if a party failed to comply with the order and was then sued in federal court. *Id.* at 36a n.34. Under that view, parties would have a perverse incentive to violate administrative orders so that they could establish a right to contribution under § 113.

petitioner's and the Solicitor General's discussion of contribution in this very case: Under virtually any possible interpretation of traditional common-law contribution principles, a jointly responsible party who has been compelled by the government to clean up property is deemed to discharge the liability of other jointly liable parties. *Centerior* Br., App. 33A-35A.

2. In addition to using the permissive "may" in the first sentence of § 113(f)(1), Congress made its intent unmistakably clear by including a "savings clause" in the final sentence: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the *absence* of a civil action" under CERCLA. It would have been difficult for Congress to make more plain that it did not intend the "during or following" a civil action language to act as a restriction on the right to pursue contribution in other circumstances. *See* Pet. App. 22a.

That has been the traditional position of the Department of Justice. In combination with the first sentence of § 113(f)(1), the Department has explained, the savings clause at the end shows that a "contribution action" after a voluntary clean-up "is allowed by the very terms of the statute." *Centerior* Br., App. 32A-35A. The contrary interpretation adopted by petitioner in this case, according to the Department, would "read out the last sentence of § 113(f)(1)" altogether. *Id.* at 33A.

In order to give the savings clause some meaning, petitioner, and now the Solicitor General, suggest that it is designed only to preserve *state* common-law contribution claims. Of course, that is not what the sentence says. And when Congress intended to preserve state law from preemption under CERCLA, it knew how to say so: CERCLA contains at least two explicit state-law "savings clauses" that

would, on petitioner's reading, become surplusage.[10] More important, contrary to petitioner's breezy suggestion, it is not at all obvious that Congress intended to preserve state-law contribution remedies from preemption under § 113 or § 107. Indeed, two federal circuit courts already have held to the contrary. *See Bedford Affiliates*, 156 F.3d at 425; *In re Reading Co.*, 115 F.3d at 1117. In an effort to bolster its strained reading of § 113(f)(1)'s savings clause, petitioner would have this Court decide an entirely different and very difficult question of preemption law, without the benefit of consideration of the issue by the court below. The Court should decline that invitation and give the savings clause its plain meaning: Nothing in subsection 113(f)(1), including the reference to actions "during or following" CERCLA suits, restricts a PRP's right to seek contribution at any time.

Finally, petitioner notes that the last sentence of § 113(f)(1) does not affirmatively create a right of contribution, but simply provides that rights of contribution are "not diminished" by anything in the subsection. That is correct. The right to contribution does not arise from the savings clause of § 113(f)(1), but is simply *preserved* by that sentence. The right itself flows from § 107. As the Ninth Circuit has explained, "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 113." *Pinal Creek Group*,

[10] Section 302(d) of CERCLA provides that nothing in CERCLA "shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law . . . ." 42 U.S.C. § 9652(d). Section 114(a) provides that CERCLA does not preempt "any State from imposing any additional liability" with respect to hazardous substances. *Id.* at § 9614(a).

118 F.3d at 1301.[11] The Department of Justice has endorsed the same understanding – that liability for contribution arises from § 107, while § 113 "fills [the] void" left by § 107 by specifying precisely what "form that liability should take." *Pinal* Br. at *10.

In short, the last sentence of § 113(f)(1) acts not as a savings clause preserving *state* claims, but as an express reservation of CERCLA's once-implied right of contribution – which is not "diminished" in any way by the "during or following" language found earlier in the subsection.

C. Nothing In The Legislative History Or Statutory Structure Compels A Different Result.

1. The plain language of § 113(f)(1) avoids the need to resort to legislative history. But in any event, that history is perfectly consistent with the obvious and sensible reading given § 113(f)(1) by the *en banc* court below.

Only one thing is clear from the legislative history. In adopting § 113(f), Congress intended to "clarify" and "confirm" the right of contribution that federal courts had previously found implied in the statute. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, at 59, 79 (1985); S. Rep. No. 99-11, at 44 (1985); 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford) (predicting that § 113 would "remove any doubt as to the right of contribution"). Nothing in the legislative his-

[11] *See also New Castle County*, 111 F.3d at 1122 (§ 113 "does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs]"); *United Tech.*, 33 F.3d at 102 n.10; *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993) ("Section 113(f), however, does not create the right of contribution – rather the source of a contribution claim is section 107(a). Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.") (citations omitted).

tory indicates that Congress intended to cut back on the then prevailing right of PRPs who cleaned up property either voluntarily or in response to a government order to seek cost recovery or contribution under § 107.[12] Petitioner, however, would read section 113(f) as an axe with which Congress lopped off the prior rights of these PRPs. Nowhere in the limited legislative history does Congress suggest any intent to drastically curtail a PRP's pre-existing right to seek cost recovery under CERCLA.[13]

Beyond confirming Congress' intent to approve a right of contribution, the legislative history must be viewed with caution. Section 113(f) was preceded by several drafts with varying language, and selective quotation from the legislative history obscures the fact that many references were to differing versions of what finally became § 113(f). *See* Pet. App. 78a (Weiner, J., dissenting). The legislative history is particularly confused and inconsistent regarding any congressional intent on the timing of a right of contribution. Some statements in the legislative history indicate that Congress generally intended to confirm a right of contribution by

[12] Petitioner states that, prior to SARA, no federal court had recognized a cause of action for contribution except in cases following federal civil actions. That is incorrect. As the *en banc* court below explained, *all* of numerous cost-recovery claims by PRPs recognized by federal courts under § 107 were *inherently* actions for contribution. As the court of appeals explained, in the pre-SARA era, "lower federal courts were implementing, albeit unevenly, contribution rights that did not depend on pre-existing EPA administrative orders and that did not arise solely 'during or following' CERCLA enforcement actions." Pet. App. 18a.

[13] As the *en banc* court noted, "It would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts' development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution. In no even does the history 'overwhelmingly support' the panel majority's narrow view of the statute." Pet. App. 22a.

responsible parties. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, at 59 (1985) ("The bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site."); *id.* at 266 ("The section would also establish a federal right of contribution or indemnity for persons *liable* under § 106 or § 107 of current law . . . .") (emphasis added); S. Rep. No. 99-11 (1985) (principal goal of new section was to "clarif[y] and confirm[ ] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the clean-up cost that may be greater than its equitable share under the circumstances."). Other statements indicate that members of Congress understood that the right of contribution exists during or following a federal civil action. *See, e.g.*, H.R. Rep. No. 99-253, pt. I, 79 (1985) ("This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.").

These snippets of language add little to understanding the availability of a right to contribution in the absence of a prior civil action, or the meaning of the last sentence in § 113(f)(1). At most, the phrases indicate that Congress confirmed a right of contribution during and following a federal civil action; they simply are silent on whether a federal right to contribution exists at other times.[14]

[14] Judge Weiner, in his dissent from the original panel decision in this case, expressed appropriate concern about reliance on fragments from the legislative history in this case. "I am mystified by the majority's willingness to cast aside its healthy skepticism about legislative history to read so much into the absence of legislative discussion on this issue, especially when the plain language of the statute, through its savings clause, expressly contemplates actions for contribution in the absence of civil actions under § 106 or § 107(a)." Pet. App. 79a. *See also Pfohl Brothers Landfill Steering Comm. v. Allied Waste Sys. Inc.*, 255 F. Supp.

Nor does the legislative history support petitioner's reading of the savings clause of § 113(f)(1). Petitioner, as a result of its convoluted reading of the statute, is forced to argue that the last sentence of § 113(f) was intended to preserve state common law contribution claims from preemption by federal law. Nothing in the legislative history of § 113(f), however, indicates that Congress had any intention to address the issue of federal preemption. Petitioner would impute to Congress the intent to resolve a fundamental issue of federal-state relations without so much as a comment.

2. Petitioner argues that the statute of limitations provisions of § 113(g) require that § 113(f)(1) be read to preclude contribution actions that do not arise during or after CERCLA civil actions. Section 113(g) provides for two separate statutes of limitations: § 113(g)(2), applicable to cost-recovery actions under § 107, pegs the limitation period to commencement or completion of clean-up activities; § 113(g)(3), applicable to an "action for contribution," uses the date of judgment or settlement as a referent point for the limitations period. Because § 113(g)(3) relies on judgment or settlement to calculate the limitations period, petitioner argues, there can be no cause of action for contribution absent such a judgment or settlement.

If § 113(g) is problematic, it is a problem that has been solved. The courts of appeal that have addressed the issue have concluded that an action by a PRP brought in the absence of a prior judgment or settlement is for limitations purposes an "initial action for recovery" subject to § 113(g)(2)'s statute of limitations. *See Geraghty & Miller, Inc.*, 234 F.3d at 917; *Sun Co. v. Browning-Ferris, Inc.* 124 F.3d 1187, 1191 (10th Cir. 1997); *see also Cytec Indus., Inc.*

2d 134, 153 n.17 (W.D.N.Y. 2003) (rejecting implication from the legislative history drawn by the majority panel decision in *Aviall*).

v. B.F. Goodrich Co., 232 F. Supp. 2d 821 (S.D. Ohio 2002) (applying Sixth Circuit opinion in *Centerior Serv. Co.*, 153 F.3d at 344).[15] In doing so, each court of appeals has nonetheless concluded that the action by the PRP retained its essential character as an action for contribution and was therefore properly brought under § 113(f). There is no need for the Court to address the statute of limitations issue in this case, and – as experience in the lower courts shows – nothing about the statute of limitations provision precludes the reading of § 113 advanced by Aviall and adopted by the court below.

II. PETITIONER'S POSITION IS INCONSISTENT WITH BOTH THE LEGISLATIVE PURPOSE BEHIND CERCLA AND DECADES OF SETTLED CASE LAW.

A. Petitioner's Position Would Lead To Results That Are Directly Contrary To The Congressional Intent Behind CERCLA.

The position of the *en banc* court of appeals is consistent not only with the plain language of the statute but also with the fundamental purposes of CERCLA. In contrast, petitioner advances a position whose consequences fly directly in the face of Congress' objectives and produce a result so

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[15] Courts have considered two other approaches to the statute of limitations issue when a PRP commences a cost-recovery action in the absence of a judgment or settlement. *See City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1334-35 (E.D. Cal. 1998) (in addition to treating such a claim as an "initial action" subject to § 113(g)(2), courts have considered the possibility of (1) applying § 113(g)(3) but importing a different triggering event or (2) concluding that CERCLA contains no statute of limitations in such cases). No court of appeals, however, has adopted an approach other than that referred to in the text above – simply applying § 113(g)(2).

odd and counter-intuitive that it is almost impossible to defend as a matter of legislative intent or public policy.

1. An important objective of CERCLA is to encourage parties to undertake clean-ups voluntarily, without the need for government compulsion or intervention. *See* H.R. Rep. No. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119 ("The legislation would establish a Federal cause of action in strict liability to enable the [EPA] Administrator to pursue rapid recovery of the costs incurred for the costs of such [clean-up] actions undertaken by him from persons liable therefore and *to induce such persons voluntarily* to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.") (emphasis added). This purpose has consistently been acknowledged by the federal courts. *See Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990) (describing CERCLA's "manifest legislative intent to encourage voluntary private cleanup action"); *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986) ("A review of CERCLA's legislative history shows one of the Act's principle [sic] goals to be the achievement of expeditious response to environmental hazards through *voluntary compliance* by responsible parties.") (emphasis in original).

If adopted, petitioner's position would have the obvious effect of removing a significant incentive to voluntary clean-up. Under petitioner's view, PRPs who undertake voluntary clean-ups would have no mechanism under CERCLA for seeking a fair share of costs from other responsible parties.

But the consequences of petitioner's position go further than that. Petitioner's reading of the statute would actually erect affirmative *disincentives* to voluntary action: in order to obtain a right of contribution under CERCLA, PRPs must *avoid* voluntary clean-up and instead provoke federal involvement. If a PRP did not want to absorb the entire cost of

a clean-up for which it was only partly responsible, it would have no choice but to wait to receive an administrative order rather than proceeding voluntarily – and then violate that order to provoke federal judicial enforcement. Alternatively, PRPs would be encouraged to wait for a government clean-up of the property and then a government suit to recover its costs. Nothing in the language or history of CERCLA warrants a construction that increases the need for federal involvement and discourages voluntary clean-ups.

2. It is undisputed that a key purpose of CERCLA is not only to ensure the proper clean-up of contaminated property, but also "to hold responsible parties liable for the costs of these cleanups." H.R. Rep. No. 99-253, pt. 3, at 15 (1985). In other words, those parties who are responsible for a release of hazardous substances should bear their fair share of the cost of clean-up of those hazardous substances. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989), *overruled on other grounds by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

Under petitioner's reading, however, negligent PRPs are essentially immune from liability if another PRP has cleaned up property either voluntarily or in response to a government order. In such a case, petitioner argues, the PRP who cleans up the property has no cause of action against other PRPs – who are thus freed from any obligation to pay their fair share of costs. The PRP who accepts responsibility for the clean-up, or who is singled out for a government order, bears the entire cost of the clean-up, while other jointly and severally liable parties remain free from responsibility or liability. That outcome runs directly counter to a basic purpose of CERCLA.

3. Congress also intended CERCLA to establish a clear, uniform rule of liability for the clean-up of hazardous sub-

stances. *See, e.g.*, 126 Cong. Rec. 11787 (1980) (statement of Rep. Florio) ("To ensure the development of a uniform rule of law, and to discourage business [sic] dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area."); *Wade*, 577 F. Supp. at 1337; *Wehner*, 616 F. Supp. at 27; *United States v. A&F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. at 802. Such a uniform national rule avoids a "race to the bottom" in which industries move to states with the most lenient rules of liability, and also provides certainty to commercial transactions. A uniform national rule of liability, including a right of contribution, promotes Congress' intent in this area and avoids the "balkanization" of national environmental policy.

But under petitioner's view, the contribution claims of PRPs who clean up property either voluntarily or at the direction of a government order would be subject to inconsistent state rules of contribution. Petitioner has helpfully noted that many states have adopted general rules of contribution among tortfeasors.[16] What petitioner fails to note, however, is the wide variety and inconsistency among the states re-

[16] *See* Pet. Br. at 18 n.11. As noted above, however, the status of state common law contribution claims for recovery of hazardous waste clean-up costs is in some doubt. Several courts have held that such common law claims are preempted if they conflict with the provisions of CERCLA. *See supra* at 20. The issue of preemption of state common-law claims is not before this court and need not be addressed if Aviall's position is adopted. Under the petitioner's view, however, the last sentence of § 113(f)(1) specifically preserves such state laws. If that view were accepted by the Court, the effect would be to reverse the holdings of the courts of appeals and preclude the opportunity for continued development of the issue by lower courts.

garding a statutory right of contribution by responsible parties who undertake the clean-up of hazardous substances.[17]

[17] There is enormous variety in the availability, scope, and prerequisites of state statutory provisions dealing with the right of contribution for parties cleaning up property. Thirteen states and the District of Columbia appear to have no statutes specifically authorizing a general right of contribution by parties who clean up property contaminated by hazardous substances. These include Colorado, the District of Columbia, Idaho, Iowa, Illinois (*see NBD Bank v. Krueger Ringier Inc*, 686 N.E.2d 704 (Ill. App. Ct. 1997); *Chrysler Realty Corp. v. Thomas Indus., Inc.*, 97 F. Supp. 2d 877 (N.D. Ill. 2000)), New Mexico, North Dakota (N.D. St. 23-29-16; limited right of contribution by officers and directors of solid waste landfill disposal facility), Rhode Island, South Carolina, (S.C. 1976 § 44-56-750 provides only for protection from CERCLA contribution if voluntary clean-up); South Dakota, Virginia, Wisconsin, and Wyoming.

State statutes that do authorize a right of contribution vary substantially. One state provides for contribution if clean-up was initiated by the state. *See* Ark. Stat. Ann. § 8-7-502. Another state defines its own right of contribution by reference to CERCLA sections 107 and 113. *See* Ky. Rev. Stat. Ann. § 224.01-400(25). Other states generally allow for a right of contribution if the clean-up is consistent with state law. *See* Cal. Health & Safety Code 25363(e); Del. Stat. 7 § 9105(d); Haw. Rev. Stat. § 128D-18; N.H. Rev. Stat. § 147-B:10.III(b). Two states require state approval of the clean-up. *See* La. Rev. Stat. § 30:2276.G(3); Tex. Health & Safety Code § 361.344. Others generally allow contribution for the reasonable or necessary costs of clean-up. *See* Ariz. Rev. Stat. § 49-1019; Mass. Gen. Laws ch. 21E § 4; Minn. Stat. § 115B.04. One state provides a right of contribution if the release resulted from a prohibited discharge. *See* Fla. Stat. § 376.313. Some states provide a more general right to contribution following clean-up of hazardous substances. *See* Alaska Stat. § 46.03.822(j); Md. Code, Envir. § 7-221(d); Mich. Comp. Laws § 324.20126a(7); Mont. St. § 75-10-724; N.J. Stat. § 58:10-23.11f; Pa. Cons. Stat. 35 § 6020.75; 10 Vt. Stat. Ann. § 6615(i). Finally, still other states simply refer to a right of contribution or provide contribution protection following certain types of voluntary or brownfield clean-ups. *See* Ind. Code § 13-25-5-20; Me. Rev. Stat. tit. 38, § 343-E; N.Y. Envtl. Conserv. § 27-1421; Ohio Rev. Code, § 122.659; Tenn. Code § 68-212-224; Utah Stat. § 19-6-325(5)(a).

The situation in the Fifth Circuit is instructive. Texas and Louisiana provide statutory rights of cost recovery to responsible parties that vary in their details and requirements; Mississippi has no right of contribution at all. Within the Fifth Circuit alone, a PRP's right to contribution would vary drastically – and often hinge on complicated "choice of law" questions – if the view of the petitioner were adopted. Such an approach to the remediation of hazardous substances is simply inconsistent with Congress' intent to develop a uniform, national rule of liability.[18] Indeed, § 113(f)(1) itself provides that the right of contribution under CERCLA "shall be governed by federal law."

4. A uniform federal rule that PRPs have a right of contribution under CERCLA creates no additional risk that PRPS will be subject to multiple or piecemeal litigation. Petitioner and the Solicitor General raise the specter of private parties, unleashed to undertake inadequate clean-ups, who would sue other PRPs in contribution. PRPs held liable in such contribution actions would, in the view of petitioner and the Solicitor General, apparently be subject to additional liability as the government repairs the damage caused by these inadequate voluntary clean-ups. Pet. Br. 34; SG Br. 28.

That view misunderstands the structure and operation of CERCLA. First, as discussed above, in order to qualify as recoverable damages in an action for contribution, the clean-

[18] Relegating contribution claims to state courts also shields from liability the largest PRP – the federal government. Although CERCLA plainly waived sovereign immunity for claims brought under its provisions, it did not waive immunity for claims made against the United States under state law. *See Maine v. Department of Navy*, 973 F.2d 1007, 1010, 1011 (1st Cir. 1992) (Breyer, C.J.); *O'Neal v. Department of the Army*, 742 A.2d 1095 (Pa. 1999) (dismissing environmental claims against Army because of sovereign immunity).

up costs must be substantially "consistent with the National Contingency Plan." *See, e.g., Amoco Oil Co.*, 889 F.2d at 672. Because the NCP provides that response actions taken by private parties must result in a "CERCLA-quality cleanup," 40 C.F.R. § 300.700(c)(3)(i), there is little risk that an approved clean-up will require further government intervention and hence impose additional liability on PRPs. *See supra* at 15-16.

Second, even following a civil action or settlement with the government, most PRPs remain liable for any additional actions that might be necessary at the site. Section 122(f)(6) of CERCLA provides for only a limited "covenant not to sue" when the government settles with most PRPs,[19] and the government is required in most cases to reserve the right to undertake additional action for matters arising from new information.[20] Thus, despite the Solicitor General's suggestions to the contrary, SG Br. at 21, a lawsuit or settlement by the government is not, in most cases, a dispositive determination of liability. Allowing contribution by private parties who voluntarily or under government order incur damages from a "CERCLA-quality cleanup" in a manner consistent with the National Contingency Plan creates no greater risk of subsequent federal action and multiple litigation.

[19] A complete covenant not to sue is available only for a class of "de minimis" settlements involving parties who contributed a small fraction of hazardous substances at a site. *See* CERCLA § 122(g), 42 U.S.C. § 9622(g).

[20] *See* CERCLA § 122(g)(6), 42 U.S.C. § 9622(g)(6).

B. Petitioner's Position Is Contrary To Decades Of Well-Established Federal Law And Would Undermine The Expectations Of Businesses Across The Country.

1. The decision below is the first by any federal court of appeals expressly to address the question at issue: whether the language of § 113(f)(1) precludes a PRP from bringing an action for contribution in the absence of a civil action or settlement.[21] Since the Fifth Circuit's *en banc* decision was issued, virtually every federal court that has considered the issue has agreed with the conclusion reached below. *See Western Properties Servs. Corp. v. Shell Oil Co.*, 358 F.3d 678, 684 (9th Cir. 2004) (agreeing with *en banc* decision below); *1325 "G" Street Assocs., LP v. Rockwood Pigments NA, Inc.*, 235 F. Supp. 2d 458 (D. Md. 2002) (same); *Niagara Mohawk Power Corp. v. Consolidated Rail Corp.*, 291 F. Supp. 2d 105 (N.D.N.Y. 2003) (same). And prior to its reversal by the *en banc* court of appeals, the decision of the Fifth Circuit panel in *Aviall* was rejected by every district court to consider the issue. *See City of Waukesha v. Viacom, Inc.*, 221 F. Supp. 2d 975 (E.D. Wis. 2002); *Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203 (D. Conn. 2001).[22]

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[21] This absence of litigation is itself noteworthy to the court below. Section 113(f) was adopted almost seventeen years ago; yet in all that time no party seems to have deemed the issue in this case sufficiently cogent to be raised to a court of appeals. With a nod to Conan Doyle, Judge Jones noted: "Given the enormous monetary exposure and the volume of litigation surrounding CERCLA mandates, one must assume that talented attorneys have had sufficient incentive and opportunity to explore statutory lacunae such as those created by a cramped reading of § 113(f)(1). Yet all that existed before this case arose are isolated dicta. The absence of direct precedent is like the dog that didn't bark." Pet. App. 29a. One need not be Sherlock Holmes to appreciate that the absence of litigation reflects the common understanding that CERCLA authorizes a right of contribution by PRPs even in the absence of a civil action or settlement.

2. Although no court of appeals prior to this case had been called upon to address directly whether a right of contribution exists in the absence of a federal civil action or settlement, federal courts in the preceding seventeen years have universally allowed claims for contribution to be brought in circumstances that would, on petitioner's view, bar such claims. The Fourth, Second, and Seventh Circuits have allowed actions for contribution by PRPs following state-ordered clean-ups, in the absence of any litigation or settlement. *See Crofton Ventures LP v. G&H P'ship*, 258 F.3d 292 (4th Cir. 2001); *Bedford Affiliates*, 156 F.3d at 416; *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998).[23] The Sixth Circuit has allowed a CERCLA contribution action to proceed following issuance of a federal admin-

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[22] The only court to reach a contrary conclusion was the district court in *E. I. Du Pont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740 (D.N.J. 2003). In *Western Properties Service Corp. v. Shell Oil Co.*, 358 F. 3d 678 (9th Cir. 2004), the Ninth Circuit held that the plaintiff could proceed because it had pleaded a cause of action under § 107 as well as § 113; because the source of the right to contribution was § 107, the plaintiff had, in effect, brought its claim for contribution "during" a civil action under § 107. *See* 358 F.3d at 685. Though *Western Properties* attempted to distinguish *Aviall* on its facts, the relevant facts are actually the same here: as discussed earlier, *supra* n.4, Aviall has expressly pleaded a combined cause of action brought under both sections 107 and 113. Thus, the holding of *Western Properties* is directly applicable to this case.

[23] *Rumpke of Ind. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997), contains ambiguous dicta that could be read as limiting a right of contribution under § 113(f) to situations in which a PRP sues "during or following" a federal "civil action." That dicta, however, cannot be the law of the Seventh Circuit following *PMC*. As noted above, the Seventh Circuit in *PMC* allowed a CERCLA contribution action to proceed following a state, but not federal, enforcement order.

istrative order but prior to any federal "civil action" under sections 106 or 107. *See Centerior Serv. Co.*, 153 F.3d at 349. And the Ninth Circuit has allowed actions for contribution following voluntary clean-ups. *See Pinal Creek Group*, 118 F.3d 1298. Indeed, even this Court, in *Key Tronic*, considered a § 107 cost-recovery claim by a PRP for costs outside the scope of a settlement – a claim that, by petitioner's logic, could not be brought under CERCLA. *Key Tronic*, 511 U.S. at 1963.

This line of precedent is particularly telling because § 113 is often the sole basis for federal jurisdiction in what would otherwise be state-law actions for contribution. To the extent that jurisdiction rests on invocation of § 113, it would have been incumbent on the courts themselves to consider whether that section was applicable, regardless of whether the issue was raised by litigants. The absence of any decision holding that § 113 does not allow for contribution absent a judgment or settlement is thus especially significant.

3. The Environmental Protection Agency, the executive agency with primary responsibility for the implementation of CERCLA, has consistently supported the right of cost- recovery by private parties who, either voluntarily or following government orders, clean up contaminated property. This view is expressed in the National Contingency Plan, a set of EPA regulations adopted through the notice and comment procedures of the Administrative Procedure Act.

The NCP regulations specifically contemplate an action for recovery by a PRP in the absence of a settlement or civil action. Subpart H of the NCP defines the requirements that apply to "activities by other persons." This Subpart explicitly begins with the provision that "any person may undertake a response action to reduce or eliminate a release of a hazardous substance . . . ." 40 C.F.R. § 300.700(a). The

provisions of Subpart H then specifically address when, for purposes of cost-recovery, private party actions will be considered "consistent with the NCP." *Id.* § 300.700(c)(3). Expressly included are clean-ups by private parties undertaken pursuant to an administrative order; such actions are *per se* consistent with the NCP. *Id.* § 300.700(c)(3)(ii). The remaining complex provisions of Subpart H only apply to private parties who clean up in the absence of a federal administrative order, settlement, or civil action. As noted above, EPA considers such private party clean-ups to be appropriate because these elements of the NCP ensure that such private clean-ups are conducted properly. 50 Fed. Reg. 47,912, 47,934 (1985).

Under the construction of CERCLA adopted by the petitioner, however, responsible parties have no cause of action under CERCLA at all in the absence of a federal settlement or civil action. If that construction were correct, the provisions of Subpart H would be rendered largely meaningless, and the EPA's clear and long-held understanding that PRPs may, consistent with the NCP, recover costs when they undertake clean-ups either voluntarily or in response to government orders would be rejected.

4. Since the passage of CERCLA, PRPs have relied on their federal right to recover clean-up costs from other PRPs when buying contaminated property. *See* Brief for Lockheed Martin as Amicus Curiae; Brief for Superfund Settlements Project, et al. as Amicus Curiae. Without this right, many properties would remain contaminated and unusable. Hence a buyer's ability to recover clean-up costs from others promotes the marketability of contaminated property and furthers the re-development of brownfields.

III. IF THIS COURT ADOPTS PETITIONER'S INTERPRETATION OF § 113, IT MUST REMAND FOR CONSIDERATION OF AVIALL'S CLAIM UNDER § 107.

Aviall has, as discussed above, brought this action jointly under sections 107(a)(4)(B) and 113(f). If, as petitioner argues, respondent's action is not governed by § 113, then this Court should remand for consideration of Aviall's remaining claim under § 107(a)(4)(B).

1. Since the enactment of SARA in 1986, courts of appeals have uniformly held that responsible PRPs seeking an equitable allocation of costs with other PRPs must sue in contribution under the provisions of § 113(f), rather than under § 107. Limiting PRPs to claims in contribution under § 113 ensured that an equitable allocation of costs could be made among jointly liable parties and that the "contribution protection" provisions of § 113(f)(2) could effectively protect settling parties. *See supra* at 5.

Petitioner, joined by the Solicitor General, now effectively attacks that position, arguing that the basis for those decisions – that a claim by one PRP against another is *inherently* one for contribution, regardless of the existence of a civil action or settlement – is incorrect. That position, if adopted, necessarily reopens the possibility that a broad class of PRPs have an independent claim for cost recovery under § 107. To be sure, petitioner and the Solicitor General reject this conclusion, and argue that PRPs have no right to recover at all in the absence of a civil action or settlement. But they cannot have it both ways. If an action by a PRP who seeks recovery following a voluntary or government-ordered clean-up is an action for "contribution" within the common meaning of the term, then the action may and must be brought under § 113. If not, then the uniform case law so holding is invalidated, and there is nothing to stop such PRPs

from suing under § 107. Certainly, there is nothing in the language or legislative history of SARA to even suggest that Congress intended to severely restrict rights of cost recovery under CERCLA by precluding suit under *both* § 113 and § 107.[24]

2. Petitioner's argument would thus create a different allocation of claims by PRPs between § 113 and § 107. PRPs who seek cost recovery "during or following" a "civil action" or following an administrative or judicial settlement can and must sue in contribution under § 113(f). All other parties, including PRPs who seek cost recovery following a

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[24] The Solicitor General argues that respondent is precluded from arguing that § 107 provides an independent basis for recovery because respondent brought this action jointly under sections 113 and 107, rather than under § 107 alone. SG Br. at 21 n.10. But in fact, respondent has asserted a claim under § 107, consistently maintaining that its action is brought under *both* § 107 and § 113. That is because courts of appeals, supported by the Department of Justice, have held that § 107 is the source of a right of cost recovery, including contribution, and § 113 operates by providing the "mechanics" of contribution. *See supra* at p. 19. If this Court were to hold that § 113 does not apply to this action, Aviall's underlying claim under § 107 would still remain.

In any event, if the Court adopts petitioner's position in this case, future PRPs will simply plead an exclusive cause of action under § 107, and the Court will be obliged to address the issue of § 107's application at a later date. If, as the Solicitor General urges, a nuance of pleading precludes the Court from addressing the fundamental relationship between sections 107 and 113, then perhaps this Court should wait to address the matter until, in the view of the Solicitor General, it is presented with a case that allows it to do so fully and efficiently, and dismiss the grant of certiorari in this case. That is especially true considering (1) the absence of any split among the circuits on the issue of the scope of § 113(f), (2) the well-reasoned *en banc* decision of the Fifth Circuit, (3) the unexplained reversal in position of the Department of Justice, and (4) the existence of a well-established and properly working set of understandings and expectations about the right of contribution under CERCLA.

voluntary or government ordered clean-up, must sue exclusively under § 107(a)(4)(B). This would be consistent with petitioner's view of both the traditional common-law understanding of the term contribution and the statute of limitations provisions of § 113(g).[25]

There is something to be said for this position, and if the Court adopts it, Aviall will proceed accordingly in the court below. But there is more to be said against petitioner's position. The courts of appeals have uniformly rejected it, in part because a conclusion that some broad class of PRPs has an independent cause of action under § 107(a)(4)(B) would threaten the "contribution protection" provisions of § 113(f)(2), and in part because a cause of action under § 107(a)(4)(B) would give PRPs an inappropriate right to recover all of their response costs from other PRPs without regard to the equitable allocation available through contribution.[26]

This Court need not redefine the existing understanding of the relationship between sections 113(f)(1) and 107(a)(4)(B). The existing case law is logical, coherent, and consistent with the language and purpose of CERCLA.

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[25] Some courts have been concerned by the possibility that PRPs, suing exclusively under § 107(a)(4)(B), might be able to avoid the equitable allocation of costs that exists in an action for contribution under § 113(f). This concern may be misplaced. Defendants, faced with a claim under § 107(a)(4)(B), may plead a counterclaim for contribution under § 113(f) "during" this civil action. Thus, a court, in one proceeding, could address all issues relevant to an equitable allocation of costs. *See Western Props. Servs. Co.*, 358 F.3d at 658. Courts have avoided the complications arising from this approach by their universal holding that an action by a PRP for cost recovery is a claim for contribution initially governed by § 113(f). *See Pinal Creek Group*, 118 F.3d at 1303.

[26] *See, e.g., Bedford Affiliates*, 156 F.3d at 425; *New Castle Co.*, 111 F.3d at 1121.

Quite simply, it works. The Court should resist the invitation of the petitioner to disrupt the settled and effective structure of CERCLA.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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April 8, 2004

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 97-3163

CENTERIOR SERVICE COMPANY, GENERAL ELECTRIC COMPANY, AND ASHLAND OIL, INCORPORATED
Plaintiffs-Appellants,

v.

ACME SCRAP IRON & METAL CORPORATION, et al.,
Defendant-Appellees.

On Interlocutory Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division

PROOF BRIEF OF DEFENDANTS-APPELLEES SECRETARY OF DEFENSE, SECRETARY OF VETERANS AFFAIRS, AND ADMINISTRATOR OF NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under the Comprehensive Environmental Response. Compensation, and Liability Act ("CERCLA") § 113(b). 42 U.S.C. § 9613(b). This Court has jurisdiction over the appeal pursuant to its order of February 13, 1997 granting appellant's petition pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Whether the district court correctly ruled that a private responsible parry that has conducted an emergency hazardous waste cleanup pursuant to a CERCLA § 106 Administrative Order cannot bring a cost recovery claim alleging joint and several liability under CERCLA § 107(a).

STATEMENT OF THE CASE

1. Statutory Background. CERCLA, 42 U.S.C. § 9601 et seq., was enacted in 1980 to address the vast problems associated with hazardous waste disposal sites. The statute was reauthorized and amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (Oct- 17. 1986).

CERCLA provides the Environmental Protection Agency ("EPA") with two alternate methods for achieving cleanup of hazardous waste sites. First, under Section 104, EPA can itself undertake "response" (i.e., cleanup) actions[1] to clean up

[1] Response actions include "removal" actions and "remedial actions." 42 U.S.C. § 9601(23), (24), (25). Remedial actions are those "consistent with permanent remedy" and are designed to prevent or mitigate danger to present and future public health and the environment. 42 U.S.C. § 9601(24). Removal actions are those actions taken to prevent or mitigate damage from the release of hazardous substances to public health or the environment, 42 U.S.C. § 9601(23).

a site, using the Hazardous Substances Superfund (the "Superfund"). 42 U.S.C. § 96004. In such cases, EPA can recover its response costs, defined under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), from responsible parties. Alternatively, under Section 106(a), EPA can seek to require the private parties to undertake response actions, either by issuing an administrative order requiring cleanup or by seeking judicial injunctive relief. 42 U.S.C. § 9606(a).

When EPA incurs costs for response actions, those costs can be recovered froth liable parties as defined under CERCLA § 107(a), through an action under CERCLA § 107(a)(4)(A). 42 U.S.C. § 9607(a)(4)(A). In such a "cost recovery" action, the government[2] is entitled to recover all costs incurred that arc "not inconsistent with the national contingency plan." ("NCP") the EPA regulation promulgated pursuant to Section 105 of CERCLA at 40 C.F.R. Part 300.

CERCLA also authorizes private parties to bring an action to recover response costs which they incur at a site voluntarily or under compulsion by the government. Section 107(a)(4)(B) provides a claim for relief for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

The liability of the responsible parties listed under Section 107(a) is strict, subject only to a few limited defenses specified in Section 107(b). *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989); *United States v Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 743 (8th Cir. 1986); *New York v. Shore Realty*

[2] CERCLA § 107(a)(4)(A) applies to all actions for response costs brought by "the United States Government or a State or an Indian tribe." CERCLA § 107(a)(4)(A).

Corp., 759 F.2d 1032, 1042 (1" Cir. 1985). Although not expressly provided for in the statute, where the government is the, plaintiff, liability under CERCLA § 107 is joint and several except to the extent that defendants can establish that the harm is divisible. *Meyer*, 889 F.2d at 1507 (citing *United States v. Chem Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983)); *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1515 (10th Cir. 1991); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied sub nom American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990); *United States v. Monsanto Co., 858 F.2d 160 (4N Cir. 1988), cert denied*, 490 U.S. 1106 (1989).

Before CERCLA was amended in 1986, the right of responsible parties to seek contribution from other responsible parties was disputed. *See City of New York v. Exxon Corp.*, 633 F. Supp. 609, 615 (S.D.N.Y. 1986); *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986); *Colorado v. Asarco Inc.*, 608 F. Supp. 1484, 1490 (D. Colo. 1985); *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984); *United States v. Ward*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,804, 20,806 (E.D.N.C. 1984); *City Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). This made potentially responsible parties ("PRPs") reluctant to clean up CERCLA sites voluntarily, when not all PRPs would agree to participate and pay their fair share of the cleanup costs.

When CERCLA was amended in 1986, Congress added specific provisions to assure that PRPs who paid more than their fair share of liability would have an opportunity to seek contribution from other PRPS so as to encourage PRPs to settle with the government. The provision confirming the existence of contribution rights is CERCLA § 113(f)(1), which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section [107] . . . . Such claims *shall be brought in accordance with this section* and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. 42 U.S.C. § 9613(f)(1) (emphasis added). The key provision added to encourage settlements with the government is CERCLA § 113(f)(2), which provides contribution protection to PRPs who settle with the government, as follows:
>
> A party who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims far contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2).

2. Factual Background. On October 5, 1990, EPA issued a unilateral Administrative Order pursuant to CERCLA § 106(a), requiring that Centerior Service Company, General Electric Company ("GE") and Ashland Oil, Inc. (hereinafter "plaintiffs") undertake and complete an emergency cleanup to abate an endangerment to public health and the environment at the Huth Oil Site. Memorandum at 3.[3] The Administrative Order was based upon EPA's

[3] Citations to the district court's Memorandum of Opinion and Order will be "Memorandum," which is set forth in the

investigation of the site that resulted in a determination that plaintiffs were responsible under CERCLA § 107(a) for contamination of the site.[4] *Id.* Specifically, EPA determined that Ashland Oil was an owner-operator of the site and that Centerior and GE arranged for disposal of hazardous substances at the site. *Id.* Plaintiffs have not contested their liability and have not sought reimbursement from the government. Br. at 5. Plaintiffs allege that they have incurred over $10 million in cleanup costs pursuant to the Administrative Order. Br. at 5. Plaintiffs, who did not plead and have never claimed to be innocent parties, filed this action solely under CERCLA § 107, alleging that defendants[5] are jointly and severally liable to them for all of their costs incurred while cleaning up the site.

3. Course of Proceedings. In these consolidated cases, plaintiffs assert a single claim for relief: that under CERCLA § 107(a) defendants are jointly and severally liable for response costs that plaintiffs allegedly incurred in conducting

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appendix (R.983: Memorandum, Apx. at pp. XXX). Citations to the plaintiffs' opening brief in this appeal will be to "Br."

[4] Here, EPA based its Order upon its investigation and findings that plaintiffs were liable parties within the meaning of CERCLA (R, 983: Memorandum at 3, Apx. at pp.XXX; R.1008, Ex.A: Defendants' Motion for Summary Judgment, Exhibit A (EPA Administrative Order) at 4, Apx, at pp.XXX). Parties are liable under CERCLA § 107(a) based on a four part test: (1) the site in question is a "facility" as defined by CERCLA; (2) the Defendant is a "responsible person" for the spill as defined by CERCLA; (3) there was a release of hazardous substances; and (4) such release caused the Plaintiff to incur response costs.

[5] The numerous defendants in this action include private parties and government agencies.

a removal action at the Huth Oil site. On September 13, 1996, the district court, in response to a series of pending motions[6] held that plaintiffs, as potentially responsible parties, could not assert a CERCLA § 107 claim alleging joint and several liability, but instead were limited to a contribution action under CERCLA § 113. Memorandum at 23. Accordingly, the court ruled that it would interpret the complaints as asserting contribution claims under CERCLA § 113. *Id.* In reaching this decision, the district court recognized that "the Sixth Circuit has not yet spoken on the issue at hand," *id.* at 8, and noted that "[t]he majority of district courts have followed the Circuit Courts' opinions and held that PRPs were limited to recovery under Section 113." *Id.* at 14 (citing cases). The court reasoned that any other interpretation would render CERCLA § 113 "superfluous," *id.* at 20, that the legislative history made clear that CERCLA § 113 was intended to "clarify and confirm" the common law, and that allowing Section 107 joint and several liability claims by PRPs would create inequitable results. *Id.* at 22.

On December 3, 1996, the district court certified its order for appeal (R.1043: Order at 1, Apx, at pp. XXX). On February 13, 1997, this Court granted Plaintiffs' Petition for Permission to Appeal.

STANDARD OF REVIEW

This case presents a question of statutory interpretation and therefore a question of law. Accordingly, this Court reviews the question of whether the plaintiffs may bring a joint and several liability cost recovery action under CERCLA § 107(x) de novo. *United States v. Malcuit*, 104

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[6] *See* Memorandum at 4, n. 2 for a list of ten motions, before the district court. That address the issue of whether plaintiffs are restricted to bringing a contribution action under CERCLA § 113.

F.3d 880, 884 (6th Cir. 1997).

SUMMARY OF ARGUMENT

This appeal concerns the nature of the action available to a potentially responsible party that has incurred CERCLA response costs pursuant to an uncontested CERCLA § 106(a) Administrative Order. The district court correctly held that such parties are limited to an action for contribution governed by CERCLA § 113 and may not bring a separate and independent cost recovery action under CERCLA § 107 alleging that other parties are jointly and severally liable.

Every circuit court deciding this issue has held that CERCLA suits among PRPs are in the nature of an action for contribution, regardless of how the action is labeled. That plaintiffs have not formally admitted liability or otherwise been adjudicated liable does not alter the conclusion that plaintiffs are limited to a contribution action. While it is true that the statute provides that "any person" can bring a CERCLA § 107(a) claim, Congress clearly left the scope of liability to be determined in accordance with principles of the common law. According to the common law, an action by a liable party is an action in contribution, for which liability is several only. CERCLA specifically provides that actions in contribution "should be brought in accordance with [CERCLA § 113(1)(1)]." The plain language of the statute, its legislative history and the case law all indicate that while actions by PRPs arise under CERCLA § 107, they are governed by CERCLA § 113 and the law of contribution.

Conversely, the only private patties who are entitled to joint and several liability are wholly innocent, injured parties. Plaintiffs have not plead, and could not prove, that they are innocent parties. Plaintiffs' suggestion that this Court create novel exceptions for "working PRPs" or recipients of CERCLA § 106 Orders is wholly inconsistent with the law and would lead to the absurd result of allowing liable patties

to proceed on a joint and several liability basis and thus shift the entire cost of cleanup to other responsible parties.

Apart from the legal principles, policy concerns strongly counsel against allowing liable parties, including those conducting cleanups pursuant to § 106 Orders, to employ the doctrine of joint and several liability. Allowing liable parties to bring joint and several cost recovery actions under CERCLA § 107 promotes inefficiency, ancillary litigation and unfairness. Indeed, such a result would eliminate the finality Congress intended CERCLA § I 13(f)(2) to bring to the CERCLA settlement process and therefore defeat the statutory intent of encouraging settlement. In contrast, limiting private parties to actions in contribution encourages settlement and discourages litigation abuses without significantly adding new burdens or unfairly allocating orphan shares to those who voluntarily undertake cleanups. Moreover, potentially liable parties already have incentives to conduct voluntary cleanups: they are less expensive, involve less government control and may result in fair share allocations through CERCLA § 113 contribution actions.

ARGUMENT

I. THE COURTS OF APPEALS HAVE CLEARLY ESTABLISHED THAT CLAIMS BETWEEN PRPS SOUND EXCLUSIVELY IN CONTRIBUTION

The district court concluded that the plaintiffs, as potentially responsible parties, may not assert a non-contribution cost recovery action under CERCLA § 107(a), but instead are limited to bringing a contribution action under CERCLA § 113(f). All of the circuit courts that have addressed this issue have held that whatever label is applied, liable plaintiffs are entitled only to contribution, *i.e.*, "to recover from another responsible party that portion of its costs that are in excess of their *pro rata* share of aggregate

response costs." *United Technologies Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 103 (1st Cir. 1994), *cert, denied*, 115 S. Ct. 1176 (1995); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *Redwing Carriers Inc. v. Saraland Apartments*, 94 F. 3d 1489, 1496 (11th Cir. 1996); *United States v Colorado & Eastern R.R Co. v Farmland Indus., Inc.*, 50 F.3d 1530, 1534-36 (10th Cir.,1995) ("CERC II"); *Akzo Coatings. Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7's Cir. 1994); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (51st Cir. 1989). *See also Bancamerica Commercial Corp. v. Mosher Steel*, 100 F.3d 792, 800 (10th Cir. 1996); *Control Data Corp., v. S.C.S.C., Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 88-89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).[7]

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7 Plaintiffs' assertion that *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) "explained the relationship between the plaintiff's CERCLA § 107 claim and the CERCLA § 113 contribution counterclaim" is misleading. Br. at 18; Br. at 14 n. 10. *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994), has been widely recognized as the prevailing authority in the Seventh Circuit. *Browning-Ferris*, 33 F.3d at 101; *U.S. v. Bay Battery*, 895 F. Supp. 1524, 1533 n.7 (N.D. Fla. 1995) (describing as "dubious authority"). *See also Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 677 (D. N.J. 1996); *In re Eagle-Picher Indus. Inc.*, 197 B.R. 260, 275 (S.D. Ohio 1996); *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 651 (N.D. Ohio 1995). Even courts adopting the conclusion that liable parties may bring CERCLA § 107 actions alleging joint and several liability recognize that *Akzo* controls in the Seventh Circuit. *Adhesives, Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1239 (M.D. Pa.1996); *Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.*, 925 F: Supp. 624, 631 (E.D. Missouri 1996). To the extent there was ever any doubt regarding whether *Amcast* or *Akzo* controlled in the Seventh Circuit, the issue was resolved in *Rumpke of Indiana, Inc. Cummins Engine*, 107 F.3d 1235, 1241 (7th Cir. 1997) (holding liable parties are limited to actions in contribution).

Courts have consistently recognized that in enacting CERCLA § 113(1), "Congress used the word 'contribution' in the conventional sense, and fully intended courts to give the word its customary meaning." *Browning Ferris Indus.*, 33 F.3d at 101. The conclusion of all of the above-cited circuit court opinions is in accord with general tort principles which hold that a claim for contribution is a claim in which one liable party seeks to recover from another liable party for the latter's share of a common liability. *See, e.g., Northwest Airlines, Inc. v Transport Workers Union*, 451 U.S. 77, 87-88 (1981); *In re "Agent Orange" Prod Liab. Litig.*, 818 F.2d 204, 207 (2d Cir. 1987); Restatement (Second) of Torts § 886A (1979): Uniform Contribution Among Tortfeasors Act (1955) ("UCATA") §§ 1, 1(a), 12 U.L.A. 63 (1975); Uniform Comparative Fault Act (1977) ("UCFA"), § 4(a), 12 U.L.A. 42 (Supp, 1994).[8] *See also* Black's Law Dictionary 399 (6th ed. 1990) (contribution defined as the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which be ought to pay or bear").

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8 The provisions of CERCLA regarding contribution claims were modeled on such principles, in particular UCFA. *United Sates v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1048 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990); *United States v. Bay Area Battery*, 895 F. Supp. 1524, 1533 (D. Fla. 1995).

Plaintiffs acknowledge this line of authority, but have asserted that *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524 (6w Cir. 1993), and *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), support their contention that liable parties may bring a non-contribution action under CERCLA § 107(a). Br. at 30-32. They are wrong. In *Velsicol*, the issue of whether a liable party could bring a CERCLA § 107 action alleging joint and several liability was not presented to, or addressed by, this Court.[9] Other circuit courts deciding this issue since *Velsicol* do not even mention *Velsicol*. *See, e.g., Rumpke*, 107 F.3d at 1240 (stating "The other courts of appeals that have considered the problem have agreed with our conclusion that claims properly characterized as contribution may normally be brought only under CERCLA § 11,3(f)"); *Redwing Carriers*, 94 F.3d at 1496 (deciding that liable parties limited to actions in contribution without citing to *Velsicoll*); *CERC II*, 50 F.3d at 1534-36 (same); *Browning-Ferris*, 33 F.3d at 103 (same); *Akzo*, 30 F.3d at 764 (same).

District courts in this Circuit agree. *In re Eagle*-Picher *Industries, Inc.*, 197 B.R. 260, 276 (S.D. Ohio 1996) (stating "in *Velsicol*, the question . . . simply was not presented to the Sixth Circuit"); *Darton Corp. v. Uniroyal Chemical Co.*, 917 F. Supp. 1173 (N.D. Ohio 1996) (limiting liable parties to contribution actions without citing *Velsicoll*; *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644 (N.D. Ohio 1995) (same). Even district courts deciding the other way have recognized that "*Velsicol* did not address

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[9] Rather, the Court addressed the issues of whether "the statute of limitations for a response cost recovery claim under CERCLA § 107, 42 U.S.C. § 9607 . . . should be retroactively applied to an accrued-but-not-yet-filed claim and whether the equitable, defense of lathes is available for a section 107 claim." *Velsicol*, 9 F.3d at 526.

the issue directly." *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332, 336 (W.D. Mi. 1995); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159, 161 (W.D. Ky. 1995) (recognizing that the "Sixth Circuit has not addressed this issue"). *See generally Boyce v. Bumb*, 944 F. Supp. 807, 809 (N.D. Ca. 1996) (surveying relevant case law); *Steams & Foster Bedding v. Franklin Holding Corp.*, 947 F. Supp 790, 798-9 (D. N.J. 1996) (same); *Plaskon*, 904 F. Supp. at 651-2 (same); *Gould Inc, v A & M Battery and Tire Service*, 901 F. Supp. 906, 912-13 (M.D. Pa. 1995) (same).

Nor was the issue presented to the Supreme Court in Key Tronic,[10] which concerned the recoverability of attorneys' fees under CERCLA § 107(a)(4)(B). *Key Tronic*, 114 S. Ct. at 1963. However, *Key Tronic* contains dictum that sheds light on the issue before this Court. In reviewing pre-SARA

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[10] The circuit courts have not relied on *Key Tronic* in concluding that liable parties are limited to actions in contribution. *Rumpke*, 107 F.3d at 1242; *Redwing Carriers*, 94 F.3d at 1496; *Control Data Corp.*, 53 F.3d at 936; *CERC II*, 50 F.3d at 1534-36; *Browning-Ferris*, 33 F.3d .:at 103; *Akzo*, 30 F.3d at 764. *See also, Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 799 (D. N.J. 1996) (stating "it was not the Supreme Court's intention in *Key Tronic* to comment on the viability of a PRP's action under CERCLA § 107); *Gould Inc. v. A & M Battery and Tire Service*, 901 F. Supp. 906 (M.D. Pa. 1995); *New Castle County v. Halliburton NUS Corp.*, 903 F. Supp. 771 (D. Del. 1995); *Plaskon* Electronic Materials. Inc- v Allied-Si agn-1 Inc-, 904 F. Supp. 644 (N.D. Ohio 1995)). Even *Oshtemo* recognizes that *Key Tronic* "did not address the issue of whether a private company's cost recovery claim under section 107 should be considered or limited to a contribution claim under section 113(f)." *Oshtemo*, 910 F. Supp. at 336.

interpretations of CERCLA, the *Key Tronic* Court stated that, to the extent district courts prior to SARA interpreted CERCLA as providing a private right of action, such an action was for contribution:

> In its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute particularly the §107 provisions outlining the liabilities and defenses of persons against whom the Government may assert claims-to impliedly authorize such a cause of action.
>
> The 1986 SARA amendments included a provision-CERCLA § 113(f) that expressly created a cause of action for contribution ....Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

Id., at 1965 (footnote omitted) (emphasis added). In referring to the similarity and overlap between CERCLA §§ 107 and 113, the *Key Tronic* Court indicated that both provisions authorize responsible parties to bring contribution claims.[11] Nothing in *Key Tronic* suggests that such parties previously had a right to bring CERCLA § 107 actions to impose joint and several liability. *See also Key Tronic*, 114 S. Ct. at 1966

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[11] *See infra*, part IIA (explaining that a contribution act(on arises under CERCLA § 107 but is governed by CERCLA § 113). Plaintiffs' citation to *Kev Tronic* for the proposition that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs," Br, at 32 omits the explanatory footnote that such action lies in contribution. *Key Tronic*, 114 S. Ct. at 1966.

n.11 (reiterating that the implied private right of action in CERCLA § 107 was for contribution).

The fact that plaintiffs are undisputed PRPs, but have not formally admitted liability or otherwise been adjudicated liable, does not remove this action from the confines of contribution. For example, in CER II, the Tenth Circuit, relying on the Restatement (Second) of Torts stated, "There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution." 50 F.3d at 1535. (emphasis added). *See also*, *Rumpke*, 107 F.3d at 1241 (PRP who cannot plead innocence limited to contribution claim); *Redwing Carriers*, 94 F.3d at 1513 ("Parties who are not themselves liable or potentially liable for response costs under § 107(a) of CERCLA can bring a cost recovery action directly under § 107(a) . . . ."); *Akzo Coatings, Inc.*, 30 F.2d at 763-64 (PRP cleaning. up site pursuant to consent decree limited to contribution claim).

District courts agree. *See Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947.F. Supp. 790, 800 (D. N.J. 1996) (non-innocent party cleaning up pursuant to a consent order may not proceed with an action solely under CERCLA § 107(a)); *Sun Co., Inc, v. Browning-Ferris, Inc.*, 919 F. Supp. 1523, 1530 (N.D. Ok. 1996) (PRPs cleaning up pursuant to EPA § 106 Order limited to action in contribution); *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 679-81 (S.D. N.Y. 1996) (PRP cleaning up site pursuant to a consent order limited to contribution claim); *Plaskon*, 904 F. Supp. at 652 ("Whether it admits 107(a) Liability is irrelevant; as the current owner, [plaintiff] is a PRP pursuant to § 107(a)(1)); *Darton*, 904 F. Supp at 652 ("whether it admits § 107(x) liability is irrelevant"); *Ekotek Site PRP Comm. v Self*, 881 F. Supp. 1516, 1521 (D. Utah 1995) (It is "the plaintiff's status as a 13 PR P, and not the

degree of voluntariness with which it initiated cleanup activity or the settling status of other PRPs, which is controlling . . . ."); *United States v. Bay Area Battery*, 895 F. Supp. 1524, 153 (D. Fla. 1995)(cleaning up site pursuant to consent decree limited plaintiffs to a contribution action); *Kaufman & Broad-South Bay v. Unisys Cam.*, 868 F. Supp. 1212, 1214-15 (N.D. Cal. 1994)(PRP who cannot demonstrate innocence limited to contribution action); *Ciba-Geigy Corp. v. Sandoz Ltd.*, No. 92-491, 1993 WL 668325, *5 (D. N.J. 1993)(reasoning that there would have been no need for CERCLA § 113 if PRPs could already recover full response costs under CERCLA § 107); *Transtech Indus., Inc. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1086 (D. N.J. 1992)("Absent a statutory provision to the contrary, a claim against one liable party by a party who voluntary [sic] agreed to perform certain actions pursuant to a settlement agreement is still a claim for contribution."), appeal dismissed, 5 F.3d 51 (3d Cit. 1993), *cent, denied*, 114 S. Ct. 2692; *Avnet, Inc. v. Allied-Signal, Inc.*, 825 F. Supp 1132, 1138 (D. R.I. 1992)("Under CERCLA, when one PRP sues another to recover a share of the response costs incurred by the first, that suit is a claim for contribution. ").

II. ONLY INNOCENT INJURED PARTIES MAY CLAIM THE BENEFITS OF JOINT AND SEVERAL LIABILITY

A. CERCLA Sections 1•7(a) and 113(f) Do Not Provide Separate Causes of Action for a PRP Seeking Cost Recovery.

In this action, the other defendants, the plaintiffs and the district court are of the view that CERCLA §§ 107(a) and 113(f) provide separate and distinct causes of action, and that a claim for contribution is based exclusively upon CERCLA § 113(f). The United States believes, however, that actions that sound in contribution must be brought pursuant to

CERCLA § 107(a) as governed by CERCLA § 113(f).[12] The statute and its legislative history, case law, common law and public policy support this position that an action in contribution must also be brought in the context of a CERCLA § 107 action.

This view, is supported by the plain language of the statute:

> Any person may seek contribution from any other person who is liable or potentially liable under section f 1071(a) of this title.

42 U.S.C. § 9613(f)(1)(emphasis added).[13] Only CERCLA § 107 provides the basis and the elements of a claim for recovery of "necessary costs of response," and lists the parties who are liable. 42 U.S.C. § 9607(a). Similarly, CERCLA § 107(b), 42 U.S.C. § 9607(b), provides the only defenses to liability.

The view that CERCLA § 113 applies to claims asserted under CERCLA § 107 is also supported by the legislative history of SARA, the law that added CERCLA § 113(f) to

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[12] It is for this reason that the United States has elected to file its own brief.

[13] S,gg g]w other provisions of CERCLA § 113 that apply to to claims asserted under CERCLA § 107, gX,, the jurisdiction provisions of CERCLA §§ 113(a) and (b), and the statute of limitations in CERCLA § 113(g), 42 U.S.C,§§ 9613(a), (b) and (g). As the House Judiciary Committee explained, CERCLA § 113 generally is the repository of "a number of administrative or judicial procedures applicable to Superfund decision-making and litigation" and therefore was considered an appropriate provision in which to "clarify the availability of judicial review regarding contribution claims." H.R. Rep. No. 253, 99"' Cong., 1st Sess., pt. 3 at 18-19 (1985).

the statute. CERCLA § 113(f) was added by SARA to the statute for the express purpose of clarifying that liable parties could seek relief from each other under CERCLA 8 107. *See*, H.R. Rep. No. 253, 99" Cong., 1st Sess., pt, 3 at 18-19 (1985), *reprinted in* 1986 U.S. Code Cong. and Admin. News 3041-3043 (CERCLA § 113(f) "clarifies the availability of judicial review regarding contribution claims and settlements")(emphasis added); S. Rep. No. 11, 99th Cong., 1st Sess. 43 (1985xthe bill "clarifies and confirms existing law" by adding a contribution provision)(emphasis added); 131 Cong. Rec. 24450 (1985) (statement of Sen. Stafford, the sponsor of S.51)[14] (amendment of the statute would "remove any doubt as to the right of contribution ... despite several recent district court cases correctly confirming that we intended the law to confer such a right")(emphasis added). Clarification was needed because judicial decisions prior to SARA reached inconsistent rulings on whether liable parties could sue each other under CERCLA § 107.[15]

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[14] S.51 and H.R. 2817 were the Senate and House bills, respectively, that were reconciled by a Conference Committee of the House and Senate and ultimately became SARA. S.51 had originally placed the contribution provisions within CERCLA § 107. See S.51, 99'" Cong., 1st Sess.,131 Cong. Rec. 24450 (1985). The provision was ultimately enacted in CERCLA § 113 because that is where it was in the House bill that became SARA. See H.R. 2817, 99th Cong., 1st Sess., 131 Cong. Rec. 34645 (1985).

[15] *See, e.g., City of New York v. Exxon*, 633 F. Supp. 609, 615 (S.D. N.Y. 1986), *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986), *State of Colorado v. Asarco. Inc.*, 608 F. Supp. 1484, 1490 (D. Colo. 1985), *Jones v. Inmont*, 584 F. Supp. 1425, 1428 (S.D. Ohio 1984), *United State v. Ward*, 14 Envtl. L. Rep. 20,804, 20,806 (E.D. N.C.

Thus, Congress was clear that in enacting CERCLA § 113(f) it was only confirming and clarifying an existing cause of action for contribution under CERCLA § 107. Congress did not indicate in any way in the statute or in the legislative history that CERCLA § 113(f) was intended to be entirely separate and distinct from the CERCLA § 107 cost recovery, action. *County Line Investment Company,* 933 F.2d at 1516-17 ("section 107(a) must be the source of any right to contribution").

In *Dant & Russell*, the Ninth Circuit specifically held that CERCLA § 113(f) applied to a CERCLA § 107(a) cost recovery action that sounded in contribution. 951 F.2d at 249. In *Control Data Corp.*, the Eighth Circuit explained this principle in the context of private party actions:

> Under CERCLA; if a responsible party, as defined by subsections (1) through(4), releases hazardous materials into the environment, and that release 'causes the incurrence of response costs,' then the party is liable. 42 U.S.C. § 9607(a). The question then becomes, liable: for what? CERCLA's answer is that the party is liable .for 'any other necessary cost of response incurred by any other person consistent with the national contingency plan.' 42 U.S.C. § 9607(a)(4)(B) (emphasis added). Thus a plain reading of the statute leads us to the conclusion that once a party is liable, it is liable for its share, as determined by Section 9613(f), of 'any' and all response costs, not just those costs 'caused' by its release.

53 F.3d at 936. (footnote omitted). *Accord*, *County Line Investment Company v. Tinney*, 933 F.2d 1508, 1516-17 (10th

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1984), *City of Philadelphia v. Stephan Chemical Co.*, 544 F. Supp. 1135., 1140 (E.D. Pa. 1982).

Cir. 1991) (CERCLA § 113 should not be read in isolation from CERCLA § 107; contribution claims pleaded under CERCLA § 113(f)(1) held subject to the requirement of CERCLA § 107 that costs sought to be recovered be "consistent with the National Contingency Plan"). *See also Bancamerica*, 100 F.3d 792 (where court similarly held that plaintiffs who sued for contribution under CERCLA § 113(f) were entitled to prejudgment interest as provided in CERCLA § X07(a)); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1988) (explaining that defenses under CERCLA § 107 apply to contribution actions).

Many district courts agree that CERCLA §§ 107(a) and 113(f) must be read together. *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D. N.Y. 1996) ("Section 107(a)(4)(B) must be read in conjunction with other sections of CERCLA, namely,§ 113(f) and its legislative history"). *E.g., Reynolds Metals Co. v. Arkansas Power & Light Co.*, 920 F. Supp. 991, 995 (E.D. Ark. 1996) ("[W]hile the PRP's liability will initially be predicated upon § 107(a) . . its ultimate liability . . . will be limited by the equitable share requirement of § 113(f)"); *Bay Area Battery*, 895 F. Supp. at 1533; *Transtech Indus., Inc.*, 798 F. Supp. at 1086; *Kelley v. Thomas*, 790 F. Supp. 710, 717-19 (W.D. Mi. 1990) (allowing a liable party to proceed under CERCLA § 107 but requiring apportionment under CERCLA § 113); *PVO Int'l Inc. v Drew Chemical Corp.*, No. 87-3921, 19 ELR 20077, 20080 (D.N.J. 1988) (concluding that "[S]ection 107(a) should be read in conjunction with the contribution provision in section 113(f)(1), which does provide for allocation of response costs [among liable parties]").

While some district courts have permitted CERCLA § 107 claims by potentially liable patties for joint and several liability, those courts misunderstand the statutory basis for contribution actions. *See Adhesives Research Ins, v.*

American Inks & Coatings Corp., 931 F., Supp. 1231, 1242 (M.D. Pa. 1996) (although allowing a PRP CERCLA § 107 cost recovery action to proceed, the court recognized that the majority of courts have permitted PRPs to only bring a contribution action subject to CERCLA § 113(f)); *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Az. 1996) (court did not limit PRPs to action in contribution)[16]; *Charter Township of Oshtemo v. American Cyanamid Co.*, 910 F. Supp. 332 (W.D. Mi. 1995) (a liable patty can bring a CERCLA § 107 joint and several liability action); *Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159 (W.D. Ky. 1995) (a liable or potentially liable party can bring a CERCLA § 107 action for joint and several liability).[17]

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[16] This case is currently the subject of an interlocutory appeal in the Ninth Circuit.

[17] Cases rejecting joint and several liability for claims by liable parties are legion: *e.g.*, Stearns & Foster *Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 800 (D. N.J. 1996) (a non-innocent party may not proceed with a joint and several liability CERCLA § 107(a)' action); *Reynolds Metals Co. v. Arkansas Power and Light Co.*, 920 F. Supp. 991, 994-5 (E.D. Ak. 1996) (PRP only may pursue several liability by a claim for contribution); *Plaskon*, 904 F. Supp. at 652 (PRP defendants may only be held liable for their individual, several and equitable share of responsibility of recoverable costs); *Tesa Tuc*, 919 F. Supp. 662, 679-81 (S.D. N.Y. 1996); *Gould Inc. v. A & M Tire Service*, 901 F. Supp. 906, 913 (M.D. Pa. 1995)(liability in action by party entering into consent agreement with EPA is several only); *City of Fresno v. NL Indus. Inc.*, No. 93-5091, 1995 WL 641983 (E.D. Cal. July 9, 1995)(joint and several liability unavailable in action between PRPs); *T H Agric. & Nutrition v. Aceto Chemical Co.*, 884 F. Supp. 357, 361-62 (E.D. Cal.

These district courts have all assumed, without explanation, that claims under CERCLA §§ 107 and 113 are separate and distinct, the former necessarily giving and several liability under the case law and the latter giving rise to equitable apportionment. *Pinal Creek*, 926 F. Supp. at 1403; *Barmet*, 914 F. Supp. at 163-4; *Oshtemo*, 910 F. Supp. at 335. Because CERCLA § 107 provides for a claim "by any person," these courts reason that a CERCLA § 107 cost recovery action and appendant joint and several liability are available even to responsible parties.[18] E.g., Adhesives search, 931 F. Supp. at 1238; Pinal Creek, 926 F. Supp. at 1405; Barnet, 914 F. Supp. at 164; , 910 F. Supp. at 337-38. On this purportedly straightforward plain language statutory analysis, these courts have misapplied the entire common law doctrine of joint and several liability - as if it were expressly written into CERCLA § 107(a). While a CERCLA § 107 action tray be maintained by "any person," CERCLA § 113(f)(1) mandates unequivocally that all actions that sound in contribution "shall be brought in accordance with this section." (Emphasis added). Accordingly, there is no separate CERCLA § 107 action available to CERCLA responsible parties that somehow imports the common law doctrine of joint and several liability.

1995)(stating that disallowing joint and several liability in suit between PRPs simplifies litigation); *Kaufman and Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212, 1214 (N.D. Cal. 1994) (liability in suit by non-innocent party is merely several).

[18] This reasoning ignores the Supreme Court's teaching in *Key Tronic Corp.*, 114 S. Ct. at 1965, that remedies other than joint and several liability, are available in CERCLA § 107 actions.

B. Under the Law, a Private Party, must Plead and Prove Innocence to Maintain an Action for Joint and Several Liability.

Unlike claims giving rise to joint and several liability, the very goal of an action for contribution is the equitable allocation of liability among joint tortfeasors. See generally Stuart Speiser, et al., THE AMERICAN LAW OF TORTS § 3.15 (1983 & Supp: 1995); William A. Prosser, HANDBOOK OF THE LAW OF TORTS § 47 (1964). The Supreme Court has explained:

> Typically, a right to contribution is recognized where two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of common liability. Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will escape liability.

Northwest Airlines, Inc. v. Transport Worker Union, 451 U.S. 77, 101 S. Ct. 1571, 1578, 67 L.Ed:2d 750, 760, 761 (1981). Joint and several liability, to the contrary, renders each defendant liable for the entire harm. *Restatement (Second) of Torts* § 875 (1979). Because joint and several liability would render one defendant liable for the share of response costs attributable to the other defendants, it is unavailable in contribution actions. Tesa Tuck, 919 F. Supp at 680-81. The Restatement (Second) of Torts § 886A specifies, "No tortfeasor can be required to make contribution beyond his own equitable share of the liability.[19]

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[19] Accordingly, even district courts that have allowed PRPs to proceed with non-contribution claims under CERCLA §

CERCLA does not specifically provide for joint and several liability. Rather, Congress left that issue to be determined by the courts using principles developed under the common law. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-69 (3d Cir. 1992); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). *See generally* Patrick S. Martin, *The Legacy of Chem-Dyne: Searching for Equity in CERCLA Cost-Recovery Actions*, 25 Tex. Tech L. Rev. 909, 914-17 (1994)(analyzing the legislative history). Following guidance in the legislative history, courts have uniformly relied upon the Restatement (Second of Torts for guidance in defining the scope of common law on joint and several liability. *United States v. Rohm & Haas*, 2 F.3d 1265 , 1280 (3d Cir. 1993); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993); *United States v. Monsanto Co.*, 858 F.2d 160', 171-72 (4th Cit. 1988), *cert. denied*, 490 U.S. 1106 (1989).. The Restatement provides:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

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107 acknowledge that contribution actions do not give rise to joint and several liability. *E.g.*, *The Companies for Fair Allocation v. Axil Corp.*, 853 F. Supp. 575, 579 (D. Conn. 1994); *Allied Corp. v. Acme Solvents Reclaiming*, 691 F. Supp. 1100, 1118 (N.D. III. 1988). The age old common law rule against contribution actions amongst joint tortfeasors has been steadily eroded through time-by statute and the case law. Speiser, *supra*, at § 3:15. It would be nonsensical, however, to take the additional step of allowing joint and several liability among joint tortfeasors.

Restatement (Second) of Torts § 875 (1979).[20]

Relying on the Restatement rule, courts have systematically held defendants severally liability in non-contribution CERCLA § 107(a) actions on behalf of the government (the "injured party"). *See O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied sub nom American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990); *United States v Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). This rule is critical to enabling the United States to compel responsible parties to clean up CERCLA sites and to obtain full cost recovery of EPA's Superfund expenditures from the responsible parties.[21]

However, when suit is brought by one of the responsible parties, rather than the government or another innocent, "injured" patty, the action implicates CERCLA § 113 as well because it is an action for contribution, to which joint and several liability is inapplicable. Indeed, the very purpose of imposing joint and several liability - to promptly make the innocent, injured victim whole in the face of indivisible harm

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[20] See also, Speiser, et al., supra, at § 3:6 ("Notwithstanding the usual lack of sweeping agreement, it may be safely stated that 'joint' tortfeasors are jointly and severally liable in American law and that the injured or aggrieved party has an option or election whether to treat the tort as 'joint' or 'several,'").

[21] The court stated that "[t]he legislative history of the Superfund Amendments of 1986 (which enacted section 113) makes clear that the United States may bring either a section 106 or 107 action, regardless of whether the United States itself was a generator of waste at the site . . . ." United States v. Kramer, 757 F. Supp. 397, 415 (D. N.J. 1991) (citing H.R.Rep. No. 253(I). 99th Cong., 2nd Sess. 1, 79-80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861-62).

- disappears. Many courts have recognized these important principles in the CERCLA context. Most recently, the Seventh Circuit allowed a non-contribution claim under CERCLA § 107 to proceed where a landowner alleged that it did not contribute to polluting a Superfund site. *Rumpke* 107 F.3d at 1241. However, the court warned that if the evidence showed that the plaintiff was not innocent, as alleged, it would be restricted to an action in contribution. *Id.* The court stated that "when two parties who both injured the property have a dispute about who pays how much-a derivative liability, apportionment dispute-the statute directs them to § 113(f) and only to § 113(f)." *Id.* at 1240 (emphasis added).[22] The Eleventh Circuit recently stated, "to bring a cost recovery action based solely in § 107(a), [plaintiff] would have to be an innocent party." *Redwing Carriers*, 94 F.3d at 1496.

Similarly, the First Circuit acknowledged that CERCLA

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[22] Defenses to liability in Superfund are affirmative, so a PRP will bear the burden of proving that it fits within one of the defenses. *Velsicol*, 9 F.3d at 530 ("By its terms. . . section 107 liability is only barred by a limited number of enumerated causation-based affirmative defenses . . . . [t]he plain language of section 107(b) [sets] forth the universe of [those] defenses. . ."). To the extent *Rumpke* suggests that these defenses are broadened for the purposes of bringing CERCLA § 107 actions, it is inconsistent with CERCLA and case law. *See*, *Redwing Carriers*, 94 F.3d at 1507 (stating "[p]ersons who are responsible under § 107(a) may escape CERCLA liability if they can prove one of three affirmative defenses set forth in CERCLA § 107(b)); *New York v. Lashins Arcade Co.*, 91 F.3d 353, 359 (2d Cir. 1996) (stating that a responsible party may be held strictly liable for response costs "unless it can satisfy one of CERCLA's affirmative defenses" in CERCLA § 107(b)).

imposes joint and several liability for the reimbursement of government expenses while limiting "non-innocent" PRPs to seeking the recoupment of only those expenditures exceeding their overall liability. *Browning-Ferris Indus.*, 33 F.3d at 100. Additionally, the Seventh Circuit, in rejecting the plaintiff's argument that it could bring a "direct" action[23] under CERCLA § 107(a) stated:

> [Plaintiff] has experienced *no injury* of the kind that would typically give rise 2YBy "direct action," the Court was apparently indicating a non-contribution action under CERCLA § 107(a) - to a direct claim under section 107(a) - it is not, for example, a landowner forced to clean up hazardous materials that a third, party spilled onto its property or that migrated there from adjacent lands. Instead, [plaintiff] itself is a liable party in some measure for the contamination . . . and the gist of its claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible.

Akzo Coatings, 30 F.3d at 764. A person that is innocent under one of the very limited defenses under CERCLA § 107(b) would similarly be entitled to a non-contribution CERCLA § 107 action. *See Kaufman and Broad-South Bay*, 868 F. Supp. at 1216. *See also*, CERC II, 50 F.3d at 1534-36; *United Technologies*, 33 F.3d at 101-103; *Amoco Oil Co.*, 889 F.2d at 672.

Indeed, two district court cases in this Circuit have recognized this important distinction between innocent and non-innocent parties in the CERCLA context. For example, in *Dartron Corp.*, the district court stated: "Actions for full cost recovery under § 9607(a) may be brought by: (1)

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[23] By "direct action," the Court was apparently indicating a non-contribution action under CERCLA § 107.

federal or state governments; or (2) 'innocent' private parties." *Dartron Corp.*, 917 F. Supp. at 1182. The court went on to explain that because the plaintiff did not fit within one of CERCLA's affirmative defenses, it "is not an innocent private party and is limited to an action in contribution." *Id.* *See also*, *Plaskon*, 904 F. Supp. at 651-52 (explaining that the linchpin of the analysis is whether a party is innocent). *See also Stearns*, 947 F. Supp. at 801 (stating "I conclude that [the plaintiff] may not proceed with an action under Section 107(a) unless it can demonstrate that it is an 'innocent' party"); *Boyce v. Bumb*, 944 F. Supp. at 812 ("The Courts of Appeals have recognized that 'innocent' parties may bring cost recovery actions under § 9607(a)"). Here, plaintiffs have not, and cannot, plead that they are innocent parties. Accordingly, they cannot allege joint and several liability.

C. This Court Should Reject Plaintiffs' Novel and Inconsistent Proposals to Create Judicial Exceptions to the Contribution Rule for "Working PRPs" and 106 Order Recipients.

Citing one district court opinion in another Circuit,[24] plaintiffs propose that this Court adopt a "working PRP" exception to the contribution rule. Br. at 15-16. Plaintiffs argue that CERCLA § 107(a)(4)(B), in allowing private party actions to recover "costs of response incurred," differentiates between responding and non-responding parties and allows responding parties to bring independent CERCLA § 107 actions regardless of their liability. *Id.* This Court should reject this novel proposal.

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[24] *United States v. Taylor*, 909 F. Supp. 355 (M.D. N.C. 1995). The same misconstruction of the statute was adopted by the district court in *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Az. 1996), which is currently subject to an interlocutory appeal.

CERCLA recognizes, of course, that a person can incur response costs (hereinafter "responding costs") either by conducting a cleanup[25] in the first instance or by compensating the government or other party pursuant to a settlement or judgment for funds expended in a cleanup (hereinafter "non-responding costs"). *See generally, Browning-Ferris*, 33 F.3d at 101 (denominating these terms "first instance" and "reimbursement" costs). In *Browning-Ferris*, the First Circuit rejected as a "sleight of hand" the identical argument asserted by plaintiffs here that responding costs are recoverable in a CERCLA § 107 joint and several liability action, while non-responding costs are recoverable in contribution only. *Id.* at 101-02. The First Circuit explained that the language of CERCLA § 107(a)(4)(B) is too broad to support such an interpretation and that the interpretation would fail the "commonsense test" for two reasons. *Id.* at 102. The court explained:

> First, 42 U.S.C. § 9613 itself appears to reject any distinction for the purposes of contribution between first-instance costs and reimbursed costs. After all subsection 9613(f)(3)(B) authorizes a party to seek contribution for "some or all of the response action or for some or all of the costs of such action . . ." The simple reading of this subsection is that the initial phrase refers to expenses incurred in the course of liable party's direction of a site's cleanup while the second phrase refers to reimbursement of cleanup costs incurred under the government's hegemony.

Id.

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[25] The parameters of "necessary costs" are actually broader than actual cleanup costs. *See generally Key Tronic Corp.*, 114 S. Ct. 1960.

Second, the court explained that such an interpretation "emasculates the contribution protection component of CERCLA's settlement framework." *Id.* at 103. *See also Browning-Ferris Indus.*, 33 F.3d at 103 (the "mechanism for encouraging settlement would be gutted" by allowing a separate action under § 107); *Akzo Coatings, Inc.*, 30 F.3d 761. This is because a ruling that CERCLA §§ 107 and 113(f) provide separate and independent claims for relief would significantly undercut the incentive for responsible parties to settle with the government provided by the contribution protection provision of CERCLA § 113(f)(2), by potentially allowing non-settling PRPs to "end run" that provision simply by asserting their claim under CERCLA § 107. *See Tesa Tuck*, 919 F. Supp. at 681 ("contribution bar would be rendered meaningless"). The practical effect of this position would be to eliminate the finality Congress intended CERCLA § 113(f)(2) to bring to the CERCLA settlement process and therefore defeat the statutory intent of encouraging settlement. While courts have generally disallowed, such a strategy, this Court should use this opportunity to clarify the law in this area. *E.g., Rumpke*, 107 F.3d at 1239 (explaining that contribution ban would not apply if plaintiff could proceed under CERCLA § 107(a)); *United States v. Cannons Engineering*, 899 F.2d 79, 92 (1st Cir. 1990) (holding CERCLA § 113(f)(2) applicable to non-settlers' claim styled as "indemnification"). *Accord, United States v Pretty Products, Inc.*, 780 F. Supp. 1488, 1496 (S.D. Ohio 1991) (non-settling liable parties cannot avoid effect of CERCLA § 113(f)(2) by denominating their claims as "restitution"), and *United States v. U.T. Alexander*, 771 F. Supp. 830, 840-841 (S.D. Tex. 1991), *vacated and remanded* (on sanctions issue). No. 92-7038 (5th Cir. Jan. 21, 1993)(CERCLA § 113(t)(2) cannot be avoided by asserting claims for relief under state law).

Plaintiffs also assert that a comparison of the statutes of

limitations for claims for cost recovery and contribution actions "reinforces" its conclusion. Br. at 30. Specifically, they argue that the statute of limitations for contribution claims, CERCLA § 113(g)(3), provides four triggering events, none of which is the issuance of a CERCLA § 106 order.[26] Accordingly, they assert that Congress must have intended to allow them a non-contribution CERCLA § 107 claim. This analysis is flawed.

Based upon this limited situation in *which one* of the four triggers does not explicitly apply, plaintiffs would read CERCLA § 113(g)(3) out of the statute entirely (Br. at 29-30). This is because under their analysis, PRP's could proceed with a non-contribution CERCLA § 107 action, to which a different statute of limitations applies. CERCLA § 113(g)(2). This result would be "untenable" in light of a court's responsibility "to give effect to each subsection contained in a statute, indeed, to give effect to each word and phrase." *Browning-Ferris Indus.*, 33 F.3d at 101 (*citing United States v. Nordic Village*, 112 S. Ct. 1011, 1015 (1992)); *Tesa Tuck*, 919 F. Supp. at 681 ("the three year statute of limitations would be eviscerated"); *Boyce v. Bumb*, 944 F. Supp. at 809 (rejecting a similar statute of limitations argument).

Plaintiffs also suggest that this Court adopt a very specific exception to cover cases involving CERCLA § 106 Orders. Br. at 25. Specifically, they argue that CERCLA § 113(f) only permits a contribution action to be brought

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[26] The four "triggers" are: (1) an administrative settlement under CERCLA Section 122(g); (2) an administrative settlement under Section 122(h); (3) a judgment under CERCLA; or (4) a judicially approved consent decree. CERCLA § 113(g)(3). It is important to note as well that some of these four events, such as judicially approved consent decrees, often implicate "responding costs."

"during or following any civil action under section [106] . . . or under section -[107]." Because a CERCLA § 106 Order is not a "civil action", plaintiffs argue, their contribution action is barred and their only avenue of relief is a CERCLA § 107 cost recovery action alleging joint and several liability.[27] Br. at 22-26. This Court should reject this novel proposal as well.

At the outset, it is notable' that plaintiffs' argument here is inconsistent with the "working PRP" argument, for had Congress intended a "working PRP" exception, under this analysis the contribution provision should have barred all claims relating to responding costs. However, CERCLA § 113(f) specifically authorizes contribution claims in cases involving injunctive relief. Moreover, the argument is inconsistent with the plain language, the legislative history and common sense.

The plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under CERCLA § 106. More importantly, CERCLA § 113(f)(1) specifically states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] . . . or section 107." (Emphasis added).[28] Thus the

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[27] Nowhere do plaintiffs explain why they cannot bring a CERCLA § 107 action that alleges several liability only.

[28] The Seventh Circuit has broadly read the term "civil action" in this context, to include administrative orders, stating:

> Rumpke pointed out in both its brief and at oral argument that it is not subject to an administrative cleanup order . . . .Thus, Rumpke is not a party that is now or ever has been subject to a civil action under CERCLA § 106.

Rumpke, 107 F.3d at 1239.

contribution action is allowed by the very terms of the statute.[29]

Additionally, as plaintiffs correctly point out, the legislative history makes clear that the intent of this provision was to clarify and confirm the common law. Br. at 24. As explained above, the linchpin of the analysis under the common law is whether a party is liable or innocent. Plaintiffs' proposed construction therefore would not only read out the last sentence of CERCLA § 113(t)(1), but it would also dramatically alter the common law by requiring liable parties to bring joint and several liability actions and barring their actions in contribution. Constructions rendering absurd results are disfavored.[30] Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553, 559 (6th Cir. 1996) (noting that courts "should avoid an interpretation of a statute that would lead to absurd or unreasonable results").

Similarly, the plain language in CERCLA § 113(t)(1) allowing contribution actions to proceed even in the absence of an underlying civil action squarely contravenes plaintiffs'

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[29] Moreover, because plaintiffs' action arises under CERCLA § 107 in the first instance, *see infra* pp.14-20, the contribution action is itself "during" a CERCLA § 107 action.

[30] Plaintiffs' argument also ignores the Supreme Court statement that CERCLA "authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *Key Tronic*, 114 S. Ct. at, 1966. Thus, assuming arguendo that their claims were barred by CERCLA § 113(f)(1), it would still be permitted under the Supreme Court's reading of the statute.

argument that a settlement or judgment is a necessary prerequisite under CERCLA to bringing an action in contribution. Br. at 26-28. Indeed, this Court has made clear that an actual judgment or settlement is not required to bring an action for contribution. Rather, "payment in full by one of the co-obligors of a valid obligation of both obligors gives rise to the right of contribution against the one not participating in the payment." *Huggins v. Graves*, 337 F.2d 486, 489 (6th Cit. 1964) (judgment not required to seek contribution under the common law). Because a § 106 Order is a valid obligation,[31] plaintiffs' contribution action has accrued. *Kohr v. Allegheny Airlines, Inc.*, 586 F.2d 53, 56 (7th Cir. 1978) (*citing Huggins* and stating that one of the basic elements of a common law contribution action is that both parties be under a common obligation); *Dant & Russell*, 951 F.2d at 248-49(requiring equitable allocation even where cleanup was not pursuant to settlement, or judgment or "EPA arm-twisting"); *Akzo*, 30 F.3d at 764 (party cleaning up pursuant to CERCLA § 106 Order limited to action in contribution); *Amoco Oil Co.*, 889 F.2d at 672 (court restricted a site owner voluntarily cleaning up to a contribution action.); *Sun Co., Inc, Browning-Ferris. Inc.*,

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[31] A CERCLA § 106 order is such a legal obligation or responsibility, as failure to comply without "sufficient cause" subjects a person to $25,000 per day in fines and treble damages for the cleanup. CERCLA §§ 106(6), 107(c)(3). Plaintiffs have never contested their liability under the § 106 Order. A party who believes a § 106 order is invalid may respond by refusing to comply for "sufficient cause" or by obeying the order and then suing "for the return of its expenses on the ground that it was not a responsible party within the meaning of the statute after all." *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995) (citing CERCLA § 106(6)).

919 F. Supp. 1523, 1530 (N.D. Ok. 1996) (PRPs cleaning up pursuant to EPA § 106 Order limited to action in contribution).

Because CERCLA § 106 orders generally do not involve settlements or judgments. Therefore, a settlement or judgment requirement as a prerequisite to a CERCLA § 106 Administrative Order recipient's contribution action would lead to the absurd result of requiring many liable parties to proceed on a non-contribution basis.

III. POLICY CONSIDERATIONS FAVOR LIMITING PRPS TO ACTIONS IN CONTRIBUTION.

As a policy matter, limiting responsible parties to bringing contribution claims makes sense. First, it would halt the ancillary litigation and third-, fourth-, and fifth-party practice that bogs down CERCLA litigation. *T H Agriculture & Nutrition Co.*, 884 F. Supp. 375, 361 (E.D. Cal. 1995) (allowing responsible parties to bring a non-contribution CERCLA § 107 action "guarantees inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case"). One court recently explained that "reducing this sort of sequential, piecemeal litigation will further the goals underpinning CERCLA by making cases more manageable, reducing transaction costs and enabling courts to perform CERCLA allocations of , liability more efficiently." *Tesa Tuck*, 919 F. Supp. at 681. *E.g., Interstate Power Co, v. Kansas City Power & Light Co.*, 992,F.2d 804, 806 (8th Cir. 1993) (fourth-party action); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309, 1314 (D.N.J. 1992) (fourth- and fifth-party actions); H.R.Rep. No. 253, 99th Cong., 2nd Sess. part 1, 80 (1985), reprinted in1986 U.S. Code Cong. & Admin. News 2835, 2862.

Moreover, this added efficiency does not substantially burden private plaintiffs in CERCLA cases. After incurring

response costs in excess of its allocable share or agreeing with the federal or state government to pay more than its allocable share, a responsible party may sue as many other PRPs for contribution as it deems worth pursuing: The costs of "work performed in identifying other potentially responsible parties" is recoverable. *Key Tronic*, 114 S. Ct. at 1967. The PRPs ultimately joined as defendants will pay their allocable share of the costs and, facing liability only for their allocable share, will accordingly have no need to sue others for contribution.[32] Nor does the rule limiting

[32] Contrary to the district court's Memorandum at 6, a liable party does not have to prove divisibility of the harm in order to be entitled to equitable allocation under CERCLA § 113(f). *Redwing Carriers*, 94 F.3d at 1513. *See also, In re Hemingway Transport Ins.*, 993 F.2d 915, 921 n.4 (1st Cir. 1993). Indeed, if the harm were divisible in the first place, there would be no joint obligation to allocate among joint tortfeasors. Rather, the party seeking allocation only has the burden of showing that allocation is appropriate. *Environmental Transportation Systems. Ins. v. Ensco, Inc.* , 969 F.2d 503, 508 (7th Cir. 1992). In allocating liability, courts' generally consider, several equitable factors proposed as part of an amendment to the original CERCLA bill by then Representative Albert Gore of Tennessee. *See In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 900 (5th Cir. 1993). These factors are (i) whether a party's contribution to the release of hazardous wastes can be distinguished from the contributions of other parties; (ii) the volume of hazardous waste involved; (iii) the degree of toxicity; (iv) the extent of the party's actual involvement in waste generation, storage, or disposal; (v) the degree of care exercised by the party; and. (vi) the degree of cooperation with environmental officials. 126 Cong. Rec. 26,779, 26,781 (1980). *See also* H.R. Rep. No. 253 (III), 99th Cong., 1st Sess. 19 (1985). The courts have relied heavily on these factors. *See e.g., Environmental Transp. Sys., Inc. v. ENSCO, Inc.* , 969 F.2d 503, 508 (7th Cir. 1992); *Amoco Oil Co. v. Borden, Ins.*, 889 F.2d 664, 672-73 (5th Cir. 1989); *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78, 86 (D. Me. 1988), *aff'd sub nom., Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1910 (C.D. Cal. 1984); *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Other factors are often considered as well. *E.g., United States v. R.W. Meyers, Inc.*, 932 F.2d 568, 571, 572 (6th Cir. 1991) (stating that the court may consider "any factor it deems is in the interest of justice"); In re *Dant & Russell, Inc.*, 951 F.2d at 249 (upholding the allocation of 50% of the response costs to the lessee of an industrial site based principally on the relative length of its involvement with the site).

responsible parties to contribution claims broaden the defenses against PRPs. See *Environmental Transportation Systems v. ENSCO, Inc.*, 969 F.2d 503, 506-07 (7th Cir. 1992).[33]

As discussed above at pp.26-27, this approach encourages settlement by not allowing parties to "end run" contribution protection. In some situations, allowing a liable party to obtain "full, recovery" or joint and several liability under CFRCLA § 107 could result in a total escape from liability for some responsible parties. A responsible party that has resolved its liability with the government is entitled to contribution protection from other parties. 42 U.S.C. § 9613(f)(2). If the settling party were allowed to obtain "full

[33] The Third Circuit's discussion of "defenses in a broad sense" to include the statute of limitations and settlement protection in *Smith Land & Improvement Corp.*, 851 F.2d 86, is not inconsistent with the fact that defenses to liability under CERCLA § 107(b) are strictly limited.

recovery" or joint and several liability against the non-settling parties, the contribution protection bar would prevent the non-settling parties from countersuing -- resulting in a "windfall" for the settling party, who could end up paying nothing.

Nor would plaintiffs be saddled with the burden of "orphan shares." Br. at 20. In a contribution action, orphan shares should not be unfairly allocated to one party or another, but rather equitably apportioned by the district court pursuant to a number of factors. *Tesa Tuck,* 919 F. Supp. at 681 ("Courts can use the powers provided by § 113(f)(1) to allocate any 'orphan stares' among viable PRPs, with the result that each viable PRP's allocable share may include -a portion of whatever 'orphan shares' there are"); *Stearns*, 947 F. Supp. at 801 (stating "the danger that a PRP will be unable to recover the 'orphan shares,' absent Section 107's provision for joint and several liability, is a statutory 'paper tiger'"); *T H Agriculture and Nutrition*, 884 F. Supp. at 32; *City of Fresno*, 1995 WL 641983 at 4. Based upon equitable factors, any liable party could be responsible for all, part, or none of the orphan shares. *E.g., Gould, Inc.*, 901 F. Supp. at 913 (holding PRP plaintiff liable for all orphan shares based on the facts). *See generally* Prosser, *supra*, at § 48 ("In some instances . . . equity may require : . . that the share of a tortfeasor who is insolvent or absent from the jurisdiction be borne by others."); Uniform Comparative Fault Act § 2(d) (suggesting apportionment of insolvent shares).

Plaintiffs argue that the ability to assert claims for joint and several liability encourages voluntary cleanups and thus furthers the goals of CERCLA. Br. at 16.[34] However, it is unnecessary that private parties have the potent litigation

[34] It should be noted that plaintiffs did not "voluntarily" undertake cleanup efforts. They did not act until ordered to do so.

weapon of joint and several liability to encourage them to undertake "voluntary" cleanups. *See Stearns*, 947 F. Supp. at 801 ("The residual power granted to a district court in Section 113 to apportion liability according to equitable principles more than adequately protects a PRP who undertakes a clean-up of another party's toxic legacy"). Sufficient incentives already exist within the statutory scheme. First, a voluntary cleanup satisfies a responsible person's legal obligation, often allowing the continuation and improvement of business activities. Second, cleanups conducted by private parties are often much less expensive than those conducted by the government. Third, government oversight is reduced to a. minimum where parties initiate cleanups on their own. Fourth, the parties gain a significant litigation advantage in the allocation phase by presenting their cleanup efforts to the court as an equitable factor.35

Finally, it is important to note that a private party who does not initiate a cleanup "voluntarily" runs a grave risk of becoming the subject of an action for joint and several liability itself. Such a party would shoulder all of the same burdens as the liable party who "voluntarily" initiates a cleanup and subsequently seeks contribution. However, such a party would be at a significant disadvantage because it could not present to the court its "voluntary" cleanup efforts as one equitable factor.

In sum, the statutory scheme already provides sufficient incentives to encourage voluntary cleanups. The affirmation of the uniform rule in the circuit courts that a liable party is limited to an action for contribution would encourage early, efficient resolution of contribution claims, avoid piecemeal litigation, reduce transaction costs.

[35] One of the Gore factors, *supra* note 32, is the degree of cooperation with environmental officials.

CONCLUSION

For the foregoing reasons, the United States urges this Court to affirm the decision of the district court limiting plaintiffs to an action in contribution, and to clarify that actions in contribution arise under CERCLA § 107(a) and are governed by CERCLA § 113.

Respectfully submitted,

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DESIGNATION OF APPENDIX CONTENTS

The Defendants-Appellees Secretary of Defense, Secretary of Veterans Affairs, and Administrator of National Aeronautics and Space Administration, pursuant to Rule 11(b), hereby designate the following document to be included in the Joint Appendix for this matter:

Description of Item	Record Entry	Date
Exhibit A to Defendants' Motion for Summary Judgment Re: EPA Administrative Order	R.1008, Ex. A	11/14/94

Supreme Court, U.S.
FILED
MAY 13 2004
OFFICE OF THE CLERK

(13)

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner*,

v.

AVIALL SERVICES, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON THE MERITS

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No. 02-1192

COOPER INDUSTRIES, INC., *Petitioner,*

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AVIALL SERVICES, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON THE MERITS

Petitioner Cooper Industries, Inc. ("Cooper") respectfully submits this Reply to the Brief of Respondent Aviall Services, Inc. ("Aviall") and to the Briefs filed by various *Amici* supporting affirmance of the Fifth Circuit's ruling below.

Aviall and *Amici* spend an inordinate amount of time and energy discussing policy considerations that purportedly favor voluntary over compelled cleanups of hazardous waste sites, but pay scant attention to the precise question before this Court – *i.e.*, whether a private party who has not been subject to a civil action under Section 106 or Section 107(a) may seek contribution under Section 113(f)(1) of CERCLA. The Fifth Circuit's affirmative response to this question, they argue, should be upheld to facilitate enforcement of CERCLA, to better meet corporate expectations, and to further a policy that, if not at the heart of CERCLA, purportedly should be. Ascribing such lofty policy aspirations to a statute narrowly tailored to remedy a

particular problem in a most traditional way disserves not only the text and structure of Section 113(f)(1), but also congressional intent. While Cooper's opening brief answers much of what Respondent and *Amici* argue, Petitioner adds the following discussion in further reply to certain points made in the opposition briefs.

A. The Plain Language Of Section 113(f)(1) Permits Only A Limited Federal Right Of Contribution

Congress provided in Section 113(f)(1) that "[a]ny person may seek contribution" from other liable or potentially responsible persons ("PRPs") "during or following any civil action" brought under CERCLA Sections 106 or 107(a). 42 U.S.C. § 9613(f)(1). Whether the term "may" is understood in its more permissive sense, as Respondent and some *Amici* argue,[1] or as a more emphatic command, as Petitioner maintains,[2] Congress was explicit in its limitation of Section 113(f)(1) contribution rights to parties against whom a Section 106 or Section 107(a) civil action is pending or has been fully adjudicated. *See* Pet. Br. at 13-21.

As previously discussed (*id.*), the language of Section 113(f)(1)'s enabling clause and the provision's overall structure do not comfortably accommodate any other reading. Although the Fifth Circuit relies on the provision's savings

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[1] *See* Brief of Respondent ("Resp. Br.") at 17-19; Brief of *Amici Curiae* Conoco Phillips Co. *et al.* ("Conoco Br.") at 7-8.

[2] *See* Petitioner's Brief on Merits ("Pet. Br.") at 13-14. Petitioner does not understand the statute's use of "may" to compel a contribution action by a party subject to a Section 106 or Section 107(a) suit or judgment, but only to authorize such an action. It is not that a PRP *must* seek contribution in such circumstances, but that it *may* do so.

clause as authorization to ignore the "during or following" prerequisite that Congress included in Section 113(f)(1)'s operative sentence, the savings clause, by its own terms, creates no independent right of action. It simply ensures that all rights of contribution that may be available to a person in the absence of a pending or adjudicated Section 106 or 107(a) civil action *shall not be diminished* by the federal right of contribution codified in the provision's lead sentence. *See id.* at 19-20.

Petitioner is aware of no rights of contribution that fall within the saving clause's coverage other than those existing under State law (*see id.* at 18 n.11), and the federal contribution right Congress created in Section 113(f)(3)(B) upon a party's settlement of its cleanup obligations with state or federal enforcement authorities (*see id.* at 19). Nor have Respondent or *Amici* identified any others.[3] To be sure, pre-SARA, some lower federal courts had held that parties subject to a Section 107(a) enforcement action by the federal government had an implied right of action for contribution against other PRPs. *See* Pet. Br. at 10 n.5. Yet, as the legislative history makes unmistakably clear (*id.* at 22-25), Congress chose to make this implied right explicit *in the first sentence* of Section 113(f)(1).[4] Nothing in the legislative

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[3] Although several *Amici* offer the unsurprising observation that different State laws treat contribution rights differently, including some which afford no right of contribution for hazardous waste cleanups, *see* Conoco Br. 9-10; Brief of *Amici Curiae* Superfund Settlements Project et al. ("Superfund Settlements Br.") at 25-26, and Respondent seems to suggest that Section 113(f)(1)'s last sentence may not have even been intended to save State law rights of contribution (Resp. Br. at 20), they have offered nothing from the legislative history or other sources to dispute that, by using the words "[n]othing . . . shall diminish," Congress intended anything other than their plain meaning – *i.e.*, all that exists elsewhere shall be preserved.

[4] Respondent and *Amici* seek to expand Congress' stated intent for enacting Section 113(f)(1) – *i.e.*, to "clarif[y] and confirm[ ] the right of a

history suggests that, by adding a savings clause as the provision's last sentence, Congress intended to undo that handiwork.[5]

Respondent contends that this reading of Section 113(f)(1) denies Aviall all recourse against Cooper for any funds that Aviall may have voluntarily expended. Resp. Br. at 8. That is a vast overstatement of the statute's operative effect. Aviall has asserted contribution claims under Texas law, and, specifically by virtue of Section 113(f)(1)'s savings clause, Aviall certainly can pursue Cooper in State court on those State law claims. *See* Pet. Br. at 19 n.12. To be sure, Aviall will not have a federal contribution claim, either under

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person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties" (H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861) – by inviting this Court to regard all pre-SARA *cost recovery suits* as actions "in the nature of contribution," as the Fifth Circuit did. *See* Resp. Br. at 22; Brief of Atlantic Richfield *et al.* as *Amici Curiae* ("Atlantic Richfield Br.") at 19. The pre-SARA right of contribution, however, was uniformly understood in its federal common law sense as permitting contribution actions to allocate shared liability among joint tortfeasors. *See* Pet. Br. at 10 n.5. It is abundantly clear that Congress understood "CERCLA's once-implied right of contribution" (Resp. Br. at 21) in these terms, and codified only that previously implied right in Section 113(f)(1)'s first sentence. *See* Pet. Br. at 24 n.18. Whatever implications this legislative choice may have had for Section 107(a) *cost recovery actions* between and among PRPs (*id.*), as opposed to actions for *contribution*, is, of course, not presently before the Court and thus of no relevance to the present case.

[5] Respondent argues that the last sentence of Section 113(f)(1) should be understood to act "as an express reservation of CERCLA's once-implied right of contribution . . ." (Resp. Br. at 21). "CERCLA's once-implied right of contribution" was inextricably tied, however, to the presence of a Section 107 enforcement action (*id.* at 20-21), and thus the explicit language of Section 113(f)(1)'s saving clause – authorizing only contribution actions "in the *absence* of a [Section 107] civil action" – emphatically eliminates that possibility. *See also* discussion at p. 9, *infra*.

Section 113(f)(1) or otherwise.[6] But that leaves Aviall in the same position it would have been in before SARA's enactment. Just as Aviall, pre-SARA, would not have had a right of contribution by implication, because that implied right arose only in response to an enforcement action under Section 107(a) (*see* Pet. Br. at 23-24 and n.18), so too must Aviall's present claim for contribution fail, because it is not

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[6] Respondent (Resp. Br. at 20-21), and at least one of the *Amici* (Brief of Lockheed Martin Corp. as *Amicus Curiae* ("Lockheed Br.") at 8-12), assert that Aviall should at least be allowed to pursue some sort of Section 107(a)(4)(B) "blended action" that would incorporate the Section 113(f)(1) remedy of contribution. Whether any such action could even be maintained by a PRP such as Aviall under Section 107(a)(4)(B) seems dubious. Every federal court of appeals to have considered this discrete cost recovery issue, including the Fifth Circuit, has ruled that Section 107(a) is unavailable for cost recoupment purposes to persons responsible for any part of the contaminated condition (such as Aviall). *See* Pet. Br. at 35 n.29 (citing cases).

In any event, the instant case concerns only the scope and nature of the contribution right found in Section 113(f)(1), and raises no "contribution issue" under Section 107(a). Indeed, Aviall amended its original complaint to remove a Section 107(a)(4)(B) claim for cost recovery (*see* Joint Appendix ("JA") 27A), and, in a subsequent amendment to its complaint, failed to reallege the claim (JA 48A). Upon inquiry by the district court, Aviall's counsel explained that Aviall would not, and indeed could not, bring a Section 107 claim because it had participated in the pollution of the facilities. *See* JA 92A-93A. Both courts below observed that Aviall's Section 107(a)(4)(B) cost recovery claim had been "dropped" (Petition for a Writ of Certiorari Appendix 94a, 49a), and Aviall specifically advised this Court that issues concerning "the relationship between sections 113(f) and 107(a)(4)(B)," among others, "were neither raised, briefed, nor decided [below] in this case." Brief in Opposition to the Petition for a Writ of Certiorari at 10. Accordingly, Respondent's Section 107(a) "blended action," such as it is, neither can nor should be addressed in any fashion by the Court. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *see also Household Credit Servs., Inc. v. Pfennig*, 124 S. Ct. 1741, 1747 n.3 (2004) (citing *County of Kent*).

pursued "during or following [a Section 106 or 107(a)] civil action."[7] The language of Section 113(f)(1) is clear.[8]

B. Section 113(f)(1)'s Limited Right of Contribution Well Serves CERCLA's Stated and Intended Purposes

Where, as here, the provision under scrutiny is neither ambiguous nor complicated, it is unnecessary to go beyond the statutory language to discern its intended meaning. *See, Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 124 S. Ct. 1330, 1341 (2004); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Respondent and

[7] It is not altogether clear why Respondent and certain *Amici* have attempted to introduce here a discussion regarding "administrative cleanup orders." *See* Resp. Br. at 27; Atlantic Richfield Br. at 14-16; Superfund Settlements Br. at 20-23. Undeniably, Aviall did not undertake its cleanup activities pursuant to such an order. *See* Pet. Br. at 2. Moreover, Section 113(f)(1) refers only to "civil actions." If an issue should later arise about whether Congress intended "civil action," as used in Section 113(f)(1), to include administrative remediation orders, that would be the appropriate occasion to entertain the question, if at all. *But see* Brief of the United States as *Amicus Curiae* at 22-23 n.11. It certainly is not presented here.

[8] We have heretofore discussed how an examination of the statute's related provisions – particularly the one establishing the applicable limitation period for contribution actions brought in response to an adjudication or settlement (*see* Section 113(g)(3), 42 U.S.C. 9613(g)(3)) – further reinforces Petitioner's understanding of the limited nature of Section 113(f)(1)'s contribution right. *See* Pet. Br. 31-33. While Respondent and some *Amici* urge that the applicable statute of limitation's provision can be wholly disregarded for present purposes (Resp. Br. at 24-25; Lockheed Br. at 22-23; Brief of the States of New York, *et al.* as *Amici Curiae* in Support of Respondent ("States' Br.") at 4-9), they give no good reason for doing so, and every canon of statutory construction argues otherwise. *See* Pet. Br. at 32.

Amici nonetheless urge an expansive policy examination on the premise that confining the federal right of contribution under Section 113(f)(1) to suits brought "during or following [Section 106 or Section 107] civil actions" would undermine an overarching policy to encourage the *voluntary cleanup* of hazardous waste sites. *See* Resp. Br. at 23-25; Lockheed Br. at 24-30; Superfund Settlements Br. at 24-25; Conoco Br. 16-27; Atlantic Richfield Br. 10-14.

Petitioner, however, can discern no indication that CERCLA was enacted to promote strictly voluntary remediation. *See* Pet. Br. at 36-40. Neither Respondents nor *Amici* provide anything to suggest that their search through the legislative history has been any more productive. Rather, it was the very lack of voluntary private remediation that prompted Congress to enact CERCLA and immediately give the federal government "'the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.'" *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).[9] CERCLA's text readily illustrates that its various provisions were crafted to provide the government with badly needed enforcement authority to remediate disturbingly contaminated sites, and, as necessary, to compel private parties to cooperate in such efforts. *See, e.g.*, 42 U.S.C. § 9604(a) (federal removal of hazardous substances); *Id.* § 9604(e) (federal demand for information relevant to

[9] *See also Witco Corp. v. Beekhuis*, 38 F.3d 682, 688 (3d Cir. 1994); *Sidney S. Anst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (11th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 167 n.8 (4th Cir. 1988).

hazardous substance contamination); *Id.* § 9606(a) (administrative remediation orders); *Id.* § 9606(b) ($25,000 daily fine for non-compliance with federal order); *Id.* § 9607(a)(4)(A) (government or Indian tribe cost recovery actions); *Id.* § 9607(e) (barring agreements to protect PRPs from cost recovery claims); *Id.* § 9607(f) (federal liability for natural resources destruction).

The statute's legislative history affirms that this was Congress' principal focus. Congressman Florio, in describing the legislation, stated: "Both Houses addressed the key concerns which had to be dealt with in hazardous substance legislation" by ensuring that "the Government has been given the necessary authority to respond to hazardous substance releases." 126 CONG. REC. 31,964 (Dec. 3, 1980). Similarly, Senator Leahy remarked that CERCLA was designed to ensure that "the Federal Government's ability to respond to incidents involving hazardous and highly toxic substances will be greatly strengthened." *Id.* at 30,971 (Nov. 24, 1980); *see also id.* (Senator Chafee observing that CERCLA was intended to provide the government with "a tool for holding liable those who are responsible for these costs").

As already discussed (Pet. Br. at 22-23), in the aftermath of CERCLA, the concern that the joint and several enforcement mechanisms available to the federal government might impose uneven liability on targeted PRPs prompted some federal courts to fashion an implied right of contribution under Section 107(a). *See* Pet. Br. at 10 n.5 (citing cases); *id.* at 23-25. Notably, this implied right was not seen as furthering voluntary cleanups of the sort performed by Aviall in the instant case, but rather as permitting those PRPs forced to incur uneven liability under a government Section 107(a) enforcement action to seek

proportionate recovery from other PRPs.[10] *See Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 30 (E.D. Mo. 1985); *United States v. Ward*, No. 83-63-CIV-5, 1984 U.S. Dist. LEXIS 16774, at *11-*12 (D.N.C. May 11, 1984); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 995 n.8 (D.S.C. 1984).

We have already shown that Congress intended Section 113(f)(1) to codify this implied right of action. *See* Pet. Br. at 22-25. Certainly, at the time of SARA's passage, the EPA understood the contribution action being proposed as a federal right exercisable only by those facing or saddled with joint and several liability in a government enforcement action, not as a vehicle for use by PRPs (like Aviall) who chose voluntarily to clean up their contaminated facilities. *See, e.g.*, EPA Interim CERCLA Settlement Policy, at 13 (OSWER Dir. No. 9835.0, dated Dec. 4, 1985), *published in* 50 Fed. Reg. 5034, 5038 (Feb. 5, 1985) ("Contribution among responsible parties is based on the principle that a jointly and severally liable party *who has paid all or a portion of a judgment or settlement* may be entitled to reimbursement from other jointly or severally liable parties") (emphasis added); *see also* Atlantic Richfield Br. at 8-9 (citing H. Habicht testimony that fairness of joint and several liability scheme depends upon the clear availability of contribution).[11] Again, the recognized concern was over the

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[10] As originally enacted, CERCLA provided for no statutory right of contribution whatsoever. Thus, the suggestion by Respondent and *Amici* that Congress, when enacting CERCLA, regarded a federal right of contribution as an important incentive to promote voluntary cleanups seems highly implausible. *See* n.11, *infra*; *see also* Pet. Br. at 10, 37. Congress' subsequent codification of the implied contribution right in Section 113(f)(1) certainly contains no such implication. *See* Pet. Br. at 37.

[11] Respondent and some *Amici* point to policy statements made by EPA between CERCLA's enactment and the SARA amendments as reflecting an agency policy to promote voluntary cleanups. *See* Resp. Br. at 16, 35;

potentially disproportionate imposition of CERCLA liability among those targeted by the federal government in a Section 106 or Section 107(a) suit. The SARA amendments, and specifically Section 113(f)(1), were intended to and, when properly read, do in fact alleviate that concern. As stated by the Senate Committee on Environment and Public Works upon reporting out the bill that became law, "when joint and several liability *is imposed* under Section 106 or 107 of the Act, *a concomitant right of contribution* exists under CERCLA." *See* H.R. Rep. 99-253(I), at 78-79, *reprinted* in 1986 U.S.C.C.A.N. at 2861 (emphasis added) (citing with approval *Ward*, 1984 U.S. Dist. LEXIS 16774 and *South Carolina Recycling & Disposal Inc.*, 653 F. Supp. 984). *See also* Pet. Br. at 16 n.10.

This means, of course, that Section 113(f)(1) is not the general environmental tort statute that Respondent and a number of the *Amici* would portray it to be. *See County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 (10th Cir. 1991) (CERCLA was not designed to "'make injured parties whole or to [create] a general vehicle for toxic tort actions.'") (quoting *Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1299-1300 (D. Del. 1987), *aff'd*, 851

Atlantic Richfield Br. at 8-9; Conoco Br. at 18-19. While EPA may well have perceived the encouragement of voluntary action to be in its own enforcement interest, its policy statements reveal that EPA viewed "negotiated settlements" as the best vehicle to encourage voluntary cleanups and thus reduce litigation. EPA Interim CERCLA Settlement Policy, at 3-4. EPA nowhere indicates that it regarded a *right of contribution* as an incentive for voluntary cleanups – except perhaps to the extent that offering PRPs protection from contribution actions by others could encourage them to enter into negotiated settlements. *Id.* at 4. Notably, this focus on the incentives to be derived from settlements was not lost on Congress and found its way into the SARA amendments. *See* 42 U.S.C. § 9613(f)(3)(B) (right of settling party to seek contribution); *id.* § 9613(f)(2) (protection of settling party from contribution actions by other PRPs). *See also* Pet. Br. at 33-35.

F.2d 643 (3d Cir. 1988)). Far from preempting the field (*see* Pet. Br. at 38-39), the limited federal right of contribution occupies only the precise gap Congress sought to fill to ensure that the government's use of its arsenal of CERCLA enforcement tools would not foreclose those PRPs who are targeted from requiring other responsible parties to pay their share.[12]

While Aviall thus derives no direct benefit from Section 113(f)(1), Aviall does enjoy an indirect benefit insofar as the statute's savings clause protects Aviall's State law claims from federal preemption. *See* Pet. Br. at 38-39. This assurance reflects Congress' chosen balance between the federal government and the States. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1047-48 (2d Cir. 1985) (Congress and EPA envisioned joint federal and state efforts to clean up sites and to pursue costs from polluters). Congress recently readdressed that balance in the Brownfields Revitalization and Environmental Restoration

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[12] *Amicus* Lockheed Martin asserts that Petitioner's narrow reading of Section 113(f)(1) could result in "an extraordinary windfall" for the United States. *See* Lockheed Br. at 28. Where, Lockheed argues, a federal agency contributed to the contamination, the United States could, in theory, refrain from initiating a Section 106 or 107(a) suit so as to deny other responsible persons the opportunity to seek contribution against the contributing agency. No one suggests, however, that the United States has failed to pursue CERCLA suits on behalf of the EPA where a government agency contributed to the contaminated condition. Moreover, judicially approved settlements, as reflected in filed consent decrees, can be readily used to obtain an allocation of cleanup costs among responsible parties, including the United States. *See* 42 U.S.C. § 9613(f)(3)(B). Finally, Congress has specifically enacted separate legislation requiring federal agencies to address federally-owned properties that are contaminated, *see, e.g.*, 10 U.S.C. § 2701, including former Department of Defense facilities (*see id.* § 2701(c)(1)(B)). Of course, should Lockheed's stated concern about a possible government "windfall" ever materialize, it would be for Congress then – not this Court, now – to give the appropriate response.

Act of 2001, Pub. L. No. 107-118, 115 Stat. 2360 (2002) ("Brownfields Act"), by delegating primary responsibility in identifying and enforcing remediation at designated "brownfield" sites to States and local authorities. *See* Pet Br. at 38; *see also* States' Br. at 1-2 (citing 42 U.S.C. § 9604(c)(2)-(3), *id.* § 9607(a)(4)(A)); *see also id.* § 9607(o)-(q).

The suggestion of Respondent and *Amici* that Section 113(f)(1)'s federal right of contribution disserves this congressional scheme, if exercisable by PRPs only "during or following a [Section 106 or Section 107(a)] civil action," fails to appreciate the very purpose behind the SARA amendments. Through Section 113(f)(1), Congress addressed the specific problem of disproportionate liability by PRPs *subject to* a government action under Section 106 or Section 107(a). It did so in a manner carefully tailored *not to encroach* on contribution rights that responsible persons could pursue under State law. The language, structure and history of Section 113(f)(1) not only support the limited contribution right Petitioner urges, but also compel rejection of the broader reading of the Fifth Circuit.[13] *See* Pet. Br. at 33-34. Reversal of the court of appeals' *en banc* decision is therefore required.

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[13] Respondent and a number of *Amici* argue that Petitioner's more narrow reading of the statute is inconsistent with earlier statements by the United States as to how Section 113(f)(1) should be interpreted and understood, notwithstanding the United States' *amicus* brief supporting Petitioner in this case. Any inconsistencies, however, like differing views on the statute expressed by federal judges (*see* Petition for a Writ of Certiorari at 26-29), serve only to highlight why the case is now before the Court for plenary review. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (agency change in position is not invalidating). The issue here turns not on what others previously may have said about the statute, but on what Section 113(f)(1) itself says and how Congress intended the language to be read. That alone is the question for this Court to decide.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and Aviall's case should be dismissed.

Respectfully submitted.

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MAY 2004

Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

(5)

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER

v.

AVIALL SERVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a party that is potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, for cleanup of property contaminated by hazardous substances, but has not been sued under CERCLA to undertake or to pay for the cost of the cleanup, may nevertheless seek contribution under CERCLA from other jointly responsible parties.

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In the Supreme Court of the United States

No. 02-1192

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The United States has responsibility for implementing and enforcing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, which provides mechanisms for responding to the improper disposal of hazardous substances. The United States Environmental Protection Agency (EPA) has primary responsibility for administering CERCLA's cleanup authorities. See 42 U.S.C. 9604(a); Exec. Order No. 12,580, 3 C.F.R. 193 (1988). EPA and other federal agencies, which are subject to CERCLA requirements and are potentially responsible parties at a number of sites, have programs that implement cleanups. CERCLA's contribution provisions are an important component of the CERCLA scheme. The United States, which at the Court's invitation filed a brief amicus curiae in response to the petition for a writ of certiorari, accordingly has a substantial interest in this case.

STATEMENT

Aviall Services, Inc., sued Cooper Industries, Inc., in the United States District Court for the Northern District of Texas to recover expenses that Aviall has incurred in cleaning up property that Aviall purchased from Cooper. Aviall asserted that Section 107 of CERCLA, 42 U.S.C. 9607, subjects Aviall and Cooper to joint and several liability for the cleanup, and it claimed that Section 113(f)(1) of CERCLA, 42 U.S.C. 9613(f)(1), therefore renders Cooper liable to Aviall for contribution. The district court dismissed that claim, ruling that, unless and until Aviall is itself subject to suit under CERCLA, it cannot seek contribution from other potentially liable parties. Pet. App. 90a-100a. A divided panel of the court of appeals affirmed that judgment. *Id.* at 47a-89a. The en banc court of appeals, in a divided decision, vacated the panel's judgment and reversed. *Id.* at 9a-45a.

A. The CERCLA Liability Scheme

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see also H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 15 (1985) ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

CERCLA provides the President (acting primarily through the EPA, see Exec. Order No. 12,580, 3 C.F.R. 193 (1988)), with alternative means for cleaning up contaminated property. Section 104 of CERCLA authorizes EPA itself to undertake response actions designed to remove hazardous substances and provide appropriate cleanup, using the Hazardous Substance Superfund. See 42 U.S.C. 9604; see also *Bestfoods*, 524 U.S. at 55. Alternatively, Section 106(a) authorizes EPA to compel, by means of an administrative order or a request for judicial relief, the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a). Judicial challenges to the government's selection of response actions under Section 104 or the government's issuance of orders under Section 106(a) are subject to the limitations with respect to timing of review set out in Section 113(h) of CERCLA. See 42 U.S.C. 9613(h).

Whether the United States proceeds under Section 104 or Section 106(a), the United States may recover its response costs from responsible parties through a cost recovery action under Section 107(a). See 42 U.S.C. 9607(a). Section 107(a) authorizes the United States, as well as other entities, to seek recovery of cleanup costs from four categories of "covered persons"—typically referred to as "potentially responsible parties" or "PRPs"—associated with the release or threatened release of hazardous substances. 42 U.S.C. 9607(a). Those entities are:

> (1) owners and operators of facilities at which hazardous substances are located;
>
> (2) past owners and operators of such facilities at the time hazardous substances were disposed of;

(3) persons who arranged for disposal or treatment of hazardous substances; and

(4) certain transporters of hazardous substances to the site.

See 42 U.S.C. 9607(a)(1)-(4). Congress has broadly defined the pertinent statutory terms—including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal"—to reach a wide range of entities and activities. See CERCLA § 101(9), (14), (20)-(22), (26) and (29), 42 U.S.C. 9601(9), (14), (20)-(22), (26) and (29).

Section 107(a) of CERCLA specifically provides that the United States, individual States, and Indian tribes are entitled to recover from covered persons "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. 9607(a)(1)-(4)(A). The national contingency plan consists of federal regulations that prescribe the procedure for conducting hazardous substance cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300; see also CERCLA § 101(23)-(24) and (31), 42 U.S.C. 9601(23)-(24) and (31); Clean Water Act (CWA) § 311(c) and (d), 33 U.S.C. 1321(c) and (d). At a substantial number of contaminated sites, States have primary responsibility for cleanup or associated oversight. States may seek to recover their costs through Section 107(a), or they may undertake or compel cleanups and seek to recover their costs under state law. See, *e.g.*, Tex. Health & Safety Code Ann. §§ 361.181 *et seq.* (West 2001 & 2004 Supp.).

Congress has provided for coordination of federal cleanup efforts under Sections 104, 106, and 107, and state cleanup efforts under Section 107 and state law, through the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (Brownfields Act).

The Brownfields Act encourages cleanup and reuse of contaminated or potentially contaminated property by expanding protection from CERCLA liability in certain circumstances, see, *e.g.*, CERCLA § 107(*o*)-(q), 42 U.S.C. 9607(*o*)-(q), and authorizing EPA to establish and administer grant programs for site assessment and reuse, CERCLA §§ 104(k), 128(a), 42 U.S.C. 9604(k), 9628(a). The Brownfields Act places heightened reliance on state response programs by, for example, restricting the ability of the federal government to take an enforcement action under Section 106(a) or to file a cost recovery action under Section 107(a) in prescribed circumstances. See CERCLA § 128(b), 42 U.S.C. 9628(b).

CERCLA authorizes entities other than the United States, individual States, and Indian tribes to recover their costs of cleaning up contaminated property under certain circumstances. For example, a party that complies with a government order under Section 106(a) to respond to an actual or threatened release of hazardous substances may petition the government for reimbursement of its expenses on the ground that it is not liable for the response costs or that the government's decision in selecting a response action was arbitrary and capricious or otherwise not in accordance with law. See CERCLA § 106(b), 42 U.S.C. 9606(b). If the government denies the petition, the party may file a judicial action seeking reimbursement. See CERCLA § 106(b)(2)(B), 42 U.S.C. 9606(b)(2)(B).

In addition, Section 107 of CERCLA provides that persons "other" than the United States, an individual State, or an Indian tribe may recover "any other necessary costs of response" that are incurred "consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B). The courts of appeals have ruled that persons who are not themselves liable may clean up contaminated property and then invoke this provision to seek reimbursement from the same four categories of potentially

liable parties that are subject to government cleanup actions.[1] The courts of appeals have uniformly concluded, however, that a person who falls within one of those four categories cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f).[2]

Section 113(f), which Congress added as part of SARA in 1986, explicitly addresses when a potentially liable party may seek contribution. See 42 U.S.C. 9613(f). Section 113(f)(1) provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]. * * * Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106] or [Section 107].

[1] See *In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241-1242 (7th Cir. 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d. 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

[2] See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Redwing Carriers*, 94 F.3d at 1496; *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp.*, 33 F.3d at 103; *Akzo Coatings*, 30 F.3d at 764.

42 U.S.C. 9613(f)(1). Section 113(f)(2) additionally states that a party that resolves its liability to the United States or a State through an administrative or judicially approved settlement shall not be subject to contribution "regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2). Section 113(f)(3)(B) further provides:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. 9613(f)(3)(B); see CERCLA § 122, 42 U.S.C. 9622.[3] The central issue before the Court in this case is whether Section 113(f) authorizes a party that is potentially subject to CERCLA liability, but has not been sued under Section 106 or 107(a) of CERCLA and has not resolved its CERCLA liability through an administrative or judicially approved settlement, to seek contribution under CERCLA from another jointly liable party.

B. The Facts and Proceedings Below

Aviall provides aircraft maintenance services. In 1981, it purchased Cooper's aircraft engine maintenance business

[3] Section 122(a) authorizes the President (or his delegate) to enter into an agreement with persons (including responsible parties) to perform response actions if the President determines such action will be done properly by such person. 42 U.S.C. 9622(a). Section 122(d) provides that agreements with respect to remedial actions, other than "de minimis settlements" under Section 122(g), shall generally be entered in the appropriate United States district court as a consent decree. 42 U.S.C. 9622(d); see 42 U.S.C. 9622(g). Section 122(g) "de minimis settlements," 42 U.S.C. 9622(g), and Section 122(h) settlements, reached by the head of any department or agency with authority to undertake response action, 42 U.S.C. 9622(h), may be embodied in an administrative order. See CERCLA § 122(i), 42 U.S.C. 9622(i).

through an asset purchase agreement. Aviall later discovered hazardous substance contamination, allegedly arising from the activities of both Aviall and Cooper, at Texas facilities acquired from Cooper. Aviall notified Texas environmental authorities of the contamination. Those authorities confirmed that Aviall was in violation of state environmental laws and directed the company to take corrective action. In 1984, Aviall commenced cleanup activities, and, in 1995, it contacted Cooper seeking reimbursement for the response costs. Aviall later sold the facilities, but remained contractually responsible for the cleanup. Pet. App. 10a, 48a, 91a.

Aviall commenced this action against Cooper in federal district court to obtain recovery of its cleanup expenditures. Aviall's complaint alleged that Cooper had breached its contractual and warranty obligations under the asset purchase agreement. Pet. App. 91a-92a. In addition, although neither the United States nor Texas had sued Aviall to compel cleanup or to recover response costs, Aviall asserted that Cooper was liable to Aviall for contribution under Section 113(f) of CERCLA and Texas law. *Ibid.* The CERCLA contribution claim provided the sole basis for federal jurisdiction. *Id.* at 98a-99a.

The district court rejected Aviall's CERCLA contribution claim. The court concluded that "[t]he plain language of § 113(f)(1) provides that contribution claims may only be brought '*during* or *following* any civil action under [§ 106] or under [§ 107(a)].' (emphasis added)." Pet. App. 94a. The court additionally concluded that the last sentence of Section 113(f)(1) is merely a savings clause that preserves independent contribution remedies so that "parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law." *Ibid.* The district court accordingly dismissed Aviall's CERCLA contribution claim, but without prejudice in the event that a Section 106 or 107 action were

brought against Aviall in the future. *Id.* at 97a-98a & n.4. The court declined to retain federal jurisdiction over the remaining state law claims. *Id.* at 99a-100a.

A divided panel of the court of appeals affirmed. Pet. App. 47a-89a. The majority concluded that, "as a matter of statutory text and structure, CERCLA requires a party seeking contribution to be, or have been, a defendant in a § 106 or § 107(a) action." *Id.* at 57a; see *id.* at 52a-56a. The majority, like the district court, construed the final sentence of Section 113(f)(1) as merely a "savings clause" that preserved independent bases for contribution, such as Aviall's contribution claims against Cooper under Texas law. *Id.* at 56a. The majority also stated that the legislative history of CERCLA, prior CERCLA decisions, and the policy goals of CERCLA all supported its construction of the statutory text. *Id.* at 57a-66a. In contrast, the dissent reasoned that the first sentence of Section 113(f)(1) does not categorically require that a party seek contribution in response to a Section 106 or 107(a) action and that the final sentence of Section 113(f) explicitly authorizes a party to seek contribution in the absence of such suits. *Id.* at 66a-78a The dissent also stated that the legislative history, case law, and policy arguments supported its construction. *Id.* at 78a-89a.

The court of appeals granted Aviall's petition for rehearing en banc. Pet. App. 46a. The en banc court, by a divided vote, reversed the judgment of the district court. *Id.* at 9a-45a. The majority adopted the reasoning of the panel dissent and concluded:

> [S]ection 113(f)(1) does not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only "during or following" litigation commenced under sections 106 or 107(a) of CERCLA. Instead, a PRP

> may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site. Section 113(f)(1) authorizes suits against PRPs in both its first and last sentence which states without qualification that "nothing" in the section shall "diminish" any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action.

Id. at 13a-14a. Three judges dissented, concluding that "the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action." *Id.* at 41a-42a.[4]

SUMMARY OF ARGUMENT

Section 113(f)(1) of CERCLA provides that a party that is jointly liable for response costs under CERCLA may seek contribution from other liable parties, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve that liability. Section 113(f)(1)'s text squarely resolves the issue before the Court. To the extent that extra-textual authority is relevant, it confirms the plain meaning of the statutory language.

A. Section 113(f)(1) states that a person who is liable or potentially liable under Section 107(a) of CERCLA may seek contribution from a jointly liable person "during or following" any civil action under Section 106 or Section 107(a). 42 U.S.C. 9613(f)(1). That textual limitation on the scope of

[4] A number of courts have discussed the scope of Section 113(f)(1) in the wake of the panel and en banc decisions. Those courts have not reached consistent results. See, *e.g.*, *Western Properties Serv. Corp.* v. *Shell Oil Co.*, No. 01-55676 (9th Cir. Feb. 13, 2004); *E.I. DuPont De Nemours & Co.* v. *United States*, No. 97-497, 2003 WL 23104700 (D.N.J. Dec. 30, 2003); *Pfohl Bros. Landfill Site Steering Comm.* v. *Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134 (W.D.N.Y. 2003); *1325 "G" Street Assocs. LP* v. *Rockwood Pigments NA, Inc.*, 235 F. Supp. 2d 458 (D. Md. 2002); *City of Waukesha* v. *Viacom, Inc.*, 221 F. Supp. 2d 975 (E.D. Wis. 2002).

contribution under CERCLA reveals, in clear and unambiguous terms, that Section 113(f)(1) does not authorize a contribution action in the absence of an ongoing or completed Section 106 or 107(a) civil action. Section 113(f)(1)'s savings clause, which states that nothing in Section 113(f) "shall diminish the right" of any person to seek contribution in the absence of a Section 106 or 107(a) action, merely preserves any independent right the person may have, apart from Section 113(f), to seek contribution, but does not itself give rise to any right of contribution.

B. Section 113(f)(1)'s text is consistent with the traditional understanding of the legal concept of contribution. The courts have consistently recognized that a person seeking contribution must extinguish—through a pending or completed lawsuit or through settlement—the joint liability that provides the basis for the contribution claim. Section 113(f)(1) adopts that traditional limitation by providing that contribution may be sought "during or following" a Section 106 or 107(a) action that would quantify and resolve the underlying liability.

C. Section 113(f)(1)'s plain language meshes with CERCLA's liability scheme and creates a coherent mechanism for apportioning cleanup costs among jointly liable parties. The courts of appeals have consistently ruled that Section 107(a)(1)-(4)(B) allows a liable party to obtain a recovery of response costs from another jointly liable party through a contribution action brought in accordance with Section 113(f). Section 113(f)(1) allows contribution "during or following" a Section 106 or 107(a) civil action, and Section 113(f)(3)(B) allows contribution after an administrative or judicially approved settlement that resolves liability to the United States or a State. Section 113(g), in turn, specifies a limitation period for those two alternative situations. But neither Section 113(f) nor Section 113(g) provides for a contribution action in the absence of a Section 106 or 107(a)

action or a settlement of the underlying liability, thus confirming that Congress did not implicity authorize contribution in those circumstances.

D. Section 113(f)(1)'s text is also consistent with CERCLA's legislative history. The legislative history of the 1986 amendments—commonly known as SARA—that produced Section 113(f) leaves no doubt that Congress's object was to provide contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement. The Senate and House reports supporting the respective chambers' proposed bills speak specifically to that objective. By contrast, they reveal no intent to allow contribution in the absence of an ongoing or completed CERCLA suit or an administratively or judicially approved settlement.

E. Although the en banc court of appeals acknowledged the primacy of Section 113(f)(1)'s text, it ultimately neglected Section 113(f)(1)'s plain language in favor of unpersuasive extra-textual considerations. The court of appeals mistakenly relied on the pre-SARA version of CERCLA, the unarticulated assumptions of other lower courts, and "policy considerations." Congress expressed its intent through Section 113(f)(1)'s text, and that text authorizes a liable party to seek contribution only "during or following" a Section 106 or 107(a) civil action.

ARGUMENT

SECTION 113(f)(1) OF CERCLA AUTHORIZES A JOINTLY LIABLE PARTY TO SEEK CONTRIBUTION ONLY "DURING OR FOLLOWING" A CIVIL ACTION UNDER CERCLA THAT RESOLVES THAT LIABILITY

Section 113(f)(1) provides a party that is jointly liable for response costs under CERCLA with a right to contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve that liability.

Section 113(f)(1)'s savings clause does not negate that express limitation, but instead merely preserves whatever additional rights to contribution a party may have under other laws. Section 113(f)(1)'s plain language, by itself, is dispositive, and, in any event, the full spectrum of potentially relevant supplementary authorities confirms that Section 113(f)(1) means what it says.

A. Section 113(f)(1) Makes Clear That A Party May Seek Contribution Under CERCLA Only "During Or Following" A Civil Action Under Section 106 Or Section 107(a)

This Court has repeatedly emphasized that, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Trustee*, 124 S. Ct. 1023, 1030 (2004); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Section 113(f) plainly resolves the question whether a party that is potentially liable under CERCLA, but has not been sued under CERCLA to undertake or pay for the cost of the cleanup, may nevertheless seek contribution from another responsible party.

CERCLA subjects parties that have contributed to the release or threatened release of hazardous substances to liability for the resulting response costs. CERCLA §§ 106, 107(a), 42 U.S.C. 9606, 9607(a). Sections 106 and 107(a), which operate against a "venerable common-law backdrop," *Bestfoods*, 524 U.S. at 62, impose joint and several liability in accordance with common law principles unless the defendant can demonstrate that the harm from the release of hazardous substances is divisible. Section 113(f) provides a corresponding statutory right of contribution from other jointly liable

parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *Key Tronic*, 511 U.S. at 816.[5]

Section 113(f)(1) of CERCLA explicitly identifies the circumstances in which a jointly liable party may seek contribution:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], *during or following any civil action under [Section 106] or under [Section 107(a)]*.

42 U.S.C. 9613(f)(1) (emphasis added). Consistent with the traditional understanding of contribution principles, that provision expressly allows a jointly responsible party to seek contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve the joint liability that the party seeks to apportion among other responsible parties. *Ibid.*[6]

The court of appeals concluded that the first sentence of Section 113(f)(1) allows contribution actions in the absence of an ongoing or completed Section 106 or 107(a) action on the

[5] See, *e.g.*, *Centerior Serv.*, 153 F.3d at 348; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 721-722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-269 (3d Cir. 1992); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

[6] See, *e.g.*, *In re Reading Co.*, 115 F.3d at 1120 ("Although 'contribution' is nowhere defined within CERCLA, it is a term with a familiar and readily acceptable meaning. * * * As the Court of Appeals for the Seventh Circuit has described it, contribution denotes a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.'" (quoting *Akzo Coatings, Inc.*, 30 F.3d at 764)); accord *United Techs. Corp.*, 33 F.3d at 99; see also *Colorado & E. R.R.*, 50 F.3d at 1535 n.4.

mistaken ground that, if Congress had not intended to authorize such actions, it would have provided that contribution actions shall "only" be brought during or following a Section 106 or Section 107(a) action. Pet. App. 24a-25a. Congress's intent, however, is clear from the plain language of the statutory text. Section 113(f)(1)'s permissive phrasing —a "person *may* seek contribution"—indicates that Congress intended to permit contribution claims to be brought when the stated prerequisites—namely, that contribution be sought "during or following" a Section 106 or Section 107(a) action—are satisfied. 42 U.S.C. 9613(f)(1) (emphasis added). It does *not* provide authorization for contribution claims where those prerequisites are *not* satisfied. The court of appeals' contrary interpretation would render the "during or following" requirement entirely superfluous, in violation of basic canons of statutory construction. See, *e.g.*, *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1002 n.13 (2004); *Dole Food Co.* v. *Patrickson*, 123 S. Ct. 1655, 1661 (2003); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).[7]

The court of appeals also mistakenly relied (Pet. App. 25a-27a) on the last sentence of Section 113(f)(1), which provides:

> Nothing in this subsection shall *diminish the right* of any person to bring an action for contribution in the absence of a civil action under [Section 106] or [Section 107].

[7] Contrary to the court of appeals' suggestions, Section 113(f)(1)'s syntax is not "confused" and its grammar is not "inexact." Pet. App. 13a. Rather, Section 113(f)(1) speaks unambiguously through the familiar syntax and grammar that is routinely employed in granting a permissive, but limited, license. For example, a sign stating that "Visitors May Enter Through The Front Door During Normal Business Hours" informs the visitor that, if he wants to enter through the front door, he must do so during the prescribed period. It does not grant the visitor the right to use the front door at any time he wishes. See *id.* at 34a-35a (Garza, J., dissenting).

42 U.S.C. 9613(f)(1) (emphasis added). The court erroneously construed that sentence, which is clearly written in the form of a "savings" clause, as affirmatively creating a right to contribution. The specific terms of the savings provision, however, merely preserve any *independent* right to contribution that exists apart from Section 113(f)(1). See *United States* v. *Locke*, 529 U.S. 89, 105 (2000); see also *Atherton* v. *FDIC*, 519 U.S. 213, 227-228 (1997).

The court of appeals also suggested that Congress added the last sentence of Section 113(f)(1) to indicate that the federal courts "had been right," in CERCLA cases decided before Congress added Section 113(f)(1) through the 1986 SARA amendments, in engrafting an implied federal common law right of contribution onto CERCLA. Pet. App. 26a. The court's reasoning, however, rests on a mistaken understanding of the pre-SARA caselaw and, in any event, is unpersuasive. As the First Circuit has explained, the pre-SARA courts were divided on the question whether there was an implied right to contribution under CERCLA. *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1994), cert. denied, 513 U.S. 1183 (1995). Those lower courts that did recognize such a right employed the term "contribution" in its "traditional sense" to denote "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them *has been compelled to make*.'" *Id.* at 99, 100-101 (emphasis added). See note 6, *supra*.

In order to eliminate any uncertainty regarding the availability of contribution under CERCLA, Congress squarely addressed that question in SARA. That 1986 Act expressly delineated the circumstances in which contribution would thereafter be available under CERCLA by providing, in the first sentence of Section 113(f)(1), that contribution may be sought "during or following" a Section 106 or 107(a) action. Congress clearly did *not* codify the much broader version of

"contribution" adopted by the court below. Indeed, the existence of any such broader "contribution" remedy under CERCLA is necessarily foreclosed by the first sentence of Section 113(f)(1). It would have been pointless for Congress to create an explicitly limited right to contribution "during or following" a Section 106 or 107(a) action if, at the same time, the "savings" clause was implicitly establishing or incorporating an all-encompassing "contribution" remedy that would extend to *all* persons potentially liable under Section 106 or 107(a).

Thus, "the existing statutory text" precisely defines the contribution remedy, and there is no need or warrant to draw inferences from "predecessor statutes." *Lamie*, 124 S. Ct. at 1030. If Congress had intended to create an even broader form of contribution, it would have written the first sentence of Section 113(f)(1) to accomplish that result. It would not have perpetuated the pre-SARA uncertainty by depending on courts to fashion a novel form of contribution, foreign to traditional legal understanding, through Section 113(f)(1)'s savings clause. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

B. Section 113(f)(1)'s Text Is Consistent With The Traditional Understanding Of Contribution

Because Congress enacted Section 113(f)(1) against a "venerable common-law backdrop," *Bestfoods*, 524 U.S. at 62, Section 113(f)(1)'s plain language embodies the traditional legal concept of contribution. Section 113(f)(1) reflects the general understanding, firmly rooted at the time of SARA's enactment, that a right of contribution is available (1) when two or more persons are jointly liable for a debt or injury and (2) one of those persons has extinguished a disproportionate share of that liability. See, *e.g.*, *Northwest*

Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981) ("Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors *has paid* more than his fair share of the common liability." (emphasis added)); note 6, *supra*.[8]

As the Third Restatement of Torts explains, the right to contribution depends on the resolution of the underlying liability:

> A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment.

Restatement (Third) of Torts § 23 cmt. b. (2000). The Restatement recognizes that the party seeking contribution may pursue its claim at the same time that the underlying liability proceedings are underway:

> As permitted by procedural rules, a person seeking contribution may assert a *claim* for contribution and obtain a contingent judgment *in an action in which the person seeking contribution is sued by the plaintiff*, even though

[8] See also Restatement (Second) of Torts § 886A(1) and (2) (1979) ("[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them * * *. The right of contribution exists only in favor of a tortfeasor who *has discharged the entire claim* for the harm by paying more than his equitable share of the common liability." (emphasis added)); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) (1955 Revised Act) ("The right of contribution exists only in favor of a tortfeasor *who has paid more than his pro rata share of the common liability*." (emphasis added)); *Black's Law Dictionary* 297 (5th ed. 1979) ("Under principle of 'contribution,' a tortfeasor *against whom a judgment is rendered* is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff." (emphasis added)).

> the liability of the person against whom contribution is sought has not yet been extinguished.

Ibid. (second emphasis added) See also *id.* at cmt. n. ("Contribution may normally be recovered in a third-party claim in the suit in which the person seeking contribution is sued by the plaintiff or in a separate suit."). But the traditional concept of contribution does not envision that a party may seek contribution when there is no final judgment or pending action underway that would determine and extinguish the joint liability unless the party has entered into a settlement that discharges that liability. *Id.* at comment b. See, *e.g.*, Uniform Contribution Among Tortfeasors Act § 3(d), 12 U.L.A. 251 (1996) (1955 Revised Act).

CERCLA explicitly adopts the traditional limitations on contribution by providing that contribution may be sought "during or following" a Section 106 or 107(a) action, CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1), or following an administrative or judicially approved settlement, CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B). But Section 113(f)(1) does not allow contribution in the absence of a CERCLA suit that would quantify and resolve the liability that the party bringing the contribution action seeks to apportion among other jointly liable parties. 42 U.S.C. 9613(f)(1). Section 113(f)(1)'s unambiguous text conforms to the common law; it should not "be construed as making any innovation upon the common law which it does not fairly express." *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 304-305 (1959) (quoting *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879)); see, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69 (1995).

C. Section 113(f)(1)'s Text Is Consistent With CERCLA As A Whole

This Court construes congressional enactments in light of "the cardinal rule that a statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Section

113(f)(1)'s plain language meshes smoothly with CERCLA's carefully structured liability scheme. Section 113(f)(1), read as part of CERCLA's whole, creates a coherent and workable mechanism for ensuring that cleanup costs are properly apportioned among liable parties.

Section 107 of CERCLA authorizes recovery of response costs by private persons in specifically defined circumstances. Section 107(a)(1)-(4)(B) allows a person who is not liable for improper disposal of hazardous substances, but who nevertheless incurs cleanup costs, to recover the resulting costs from those persons who fall within CERCLA's four categories of liable parties. See 42 U.S.C. 9607(a)(1)-(4)(B). But the courts of appeals have uniformly concluded that Section 107(a)(1)-(4)(B) allows a liable party, such as Aviall, to obtain a recovery from another jointly liable party only through a contribution action under 113(f). See 42 U.S.C. 9607(a)(1)-(4)(B). See pp. 5-6 & nn. 1-2, *supra*.[9]

The courts of appeals have correctly recognized that, while Section 107(a)(1)-(4)(B)'s reference to "any person" is broad enough to allow one jointly liable party to sue another

[9] As the United States explained in its amicus curiae brief at the petition stage in this case (at 16-17 n.10), the federal government endorses the uniform conclusion of the courts of appeals that Section 107(a)(1)-(4)(B) does not provide an independent basis for a liable person to recover response costs from another liable person. See Amicus Brief for the United States at 10, *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (No. 97-795). As the government noted in *Pinal Creek*, that understanding of the relationship between Sections 107 and 113 is consistent with this Court's observations in *Key Tronic* that Sections 107 and 113 provide related remedies. See 511 U.S. at 816 & n.7. To the extent that the Court's observations suggest that Section 107 alone could give rise to an independent right of contribution, that "passing dictum" (*SEC* v. *Edwards*, 124 S. Ct. 892, 898 (2004)) is inconsistent with the Court's analysis in *Lamie*, which recognized that statutes should be interpreted on the basis of the "existing statutory text." 124 S. Ct. at 1030. Here, the "existing statutory text" provides an express and specific contribution remedy, see CERCLA 113(f), 42 U.S.C. 9613(f), so there is no basis for inferring another.

for the former's response costs, that Section does not prescribe what form that liability should take. When read in combination, the clear implication of Section 107(a)(1)-(4)(B) and Section 113 is that the jointly liable party is limited to seeking contribution in the manner authorized by Section 113(f). That result avoids the anomaly of a jointly liable party suing another jointly liable party for the full costs of a CERCLA cleanup. It also ensures that parties who have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2), are not subject to double liability through a Section 107(a) suit on the theory that such a suit imposes an independent basis of liability apart from contribution See cases cited at note 2, *supra*.[10]

Section 113(f) designates the two avenues by which a liable party may recover its cleanup costs. Section 113(f)(1) expressly allows a liable party to seek contribution "during or following" a Section 106 or 107(a) civil action, while Section 113(f)(3)(B) expressly allows contribution after an administrative or judicially approved settlement that resolves liability to the United States or a State. See 42 U.S.C. 9613(f)(1) and (3)(B). Section 113(g)(3) provides two corresponding limitations periods:

[10] Since the early stages of this litigation, Aviall has predicated its contribution claim on the established understanding that Section 107(a) alone does not provide a sufficient basis for a liable party to recover cleanup costs and that a liable party must also satisfy the requirements of Section 113(f). See Pet. App. 94a ("Aviall has dropped the independent § 107(a) claim and instead asserts a so-called 'combined' § 107(a) and § 113(f)(1) claim."). Aviall is accordingly precluded from reversing its position below and arguing, in the face of overwhelming contrary precedent, that Section 107(a) would provide an independent basis for it to recover its cleanup costs from Cooper. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> (A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or
>
> (B) the date of an administrative order under [Section 122(g)] (relating to de minimis settlements) or [Section 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. 9613(g)(3). See note 3, *supra* (describing Section 122(g) and (h)).

Section 113(g)(3)(A) accordingly provides a three-year limitations period for contribution actions brought "during or following" a Section 106 or 107(a) action, while Section 113(g)(3)(B) provides a three-year limitations period for contribution actions brought after the party has resolved its liability through an administrative or judicially approved settlement. Section 113(g)(3) does *not*, however, provide a limitations period for contribution actions in the absence of a Section 106 or 107(a) action or a qualifying settlement. Given the absence of any express textual basis for contribution in those circumstances, the omission of a statute of limitation that would govern such contribution claims provides further evidence that Congress did not intend to create a federal right to contribution in that situation. Rather Section 113(f)(1) means what it says and authorizes a contribution action only "during or following" a civil action under Section 106 or Section 107(a).[11]

[11] Section 106(a) authorizes the federal government to pursue both judicial actions and administrative orders "necessary to protect public health and welfare and the environment." 42 U.S.C. 9606(a). The panel majority below stated that issuance of a Section 106(a) administrative order is sufficient to trigger the right of contribution under Section 113(f)(1). See Pet. App. 57a n.5. That statement appears incorrect. Section 113(f)(1) authorizes contribution only "during or following any civil action" under Section 106 or Section 107(a), and the phrase "civil action" is commonly understood to mean a judicial proceeding. See, *e.g.*, Fed. R. Civ. P. 2. Accordingly, EPA's issuance of a Section 106(a) administrative order does not generally entitle the recipient to seek contribution under Section 113(f)(1).

D. Section 113(f)(1)'s Plain Language Is Consistent With CERCLA's Legislative History

Because Section 113(f)(1)'s language is clear, there is no need to consult its legislative history. See, *e.g.*, *Lamie*, 124 S. Ct. at 1033; *Salinas* v. *United States*, 522 U.S. 52, 57 (1997); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Connecticut Nat'l Bank*, 503 U.S. at 254; *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Nevertheless, the legislative history confirms the plain meaning of the statutory text. The pertinent Senate and House bills that ultimately became SARA contained differently worded contribution provisions. But each chamber indicated that the object was to provide for contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement.

The Senate bill initially provided that a contribution action may be brought "[a]fter judgment in any civil action under section 106 or under [section 107(a)]." See S. Rep. No. 11, 99th Cong., 1st Sess. 103 (1985) (proposed Section 107(*l*)(2)). The Senate report stated that "[t]his amendment clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 44 (emphasis added). The Senate later revised its proposed language through a floor amendment to allow contribution "during or following" a Section 106 or 107(a) action so that contribution claims could be resolved in one suit. See 131 Cong. Rec. 24,449 (1985). The sponsors explained that the floor amendment

would allow "any defendant in a Government enforcement action under CERCLA * * * to file a claim for contribution against others * * * *as soon as the enforcement action has been brought.*" *Id.* at 24,450 (Sen. Stafford) (emphasis added); see also *id.* at 24,452 (Sen. Thurmond); *id.* at 24,453 (Sen. DeConcini).

The House bill initially provided that "any defendant alleged or held to be liable in an action under section 106 or section 107" may bring a contribution action. See H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 13 (1985) (proposed Section 113(g)(1)). Like the Senate report, the House report stated that the proposed language "clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 79 (emphasis added). The House Judiciary Committee later made minor "technical" changes to the House bill that "simply clarif[y] and emphasize[] that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. Rep. No. 253, *supra*, Pt. 3, at 18.

The House-Senate conference, which produced the final language, adopted without further pertinent elaboration the Senate's "during or following" formulation and the House provisions allowing contribution following settlement. See H.R. Rep. No. 962, 99th Cong., 2d Sess. 37, 222 (1986). Thus, the legislative history confirms that Section 113(f)(1) states what Congress meant and means what it says. See *Connecticut Nat'l Bank*, 503 U.S. at 253-254.

E. The Court of Appeals' Construction Of Section 113(f)(1) Rests On Unpersuasive Extra-Textual Considerations

The en banc court of appeals acknowledged that "[s]tatutory construction begins with the plain language of a

statute." Pet. App. 12a. The court overlooked, however, that "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). The court's focus on the pre-SARA version of CERCLA, Pet. App. 14a-23a, the unarticulated assumptions of other courts, *id.* at 27a-30a, and "policy considerations," *id.* at 31a-33a, fails to give proper respect to the fundamental principle that statutory language provides the best guide to legislative intent. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

The court of appeals mistakenly attempted to draw inferences from the fact that the pre-SARA version of CERCLA contained no explicit provision for contribution, reasoning that Congress may have implicitly intended to ratify the pre-SARA case law. Pet. App. 14a-23a. As this Court has recently made clear:

> The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd —is to enforce it according to its terms."

Lamie, 124 S. Ct. at 1030 (citations omitted). Because the "existing statutory text" of Section 113(f)(1) precisely answers the question presented here, there is no warrant for attempting to derive guidance from the pre-SARA "predecessor statute[]," which did not address the question of contribution at all.

The court of appeals also mistakenly attempted to derive guidance from unstated assumptions and "isolated dicta" in other lower court decisions that suggest, without deciding, that responsible parties may seek contribution in the absence of a Section 106 or Section 107(a) action. Pet. App. 27a-30a. Responsible parties may have assumed that Section

113(f)(1) provides a broader contribution remedy than its language would support, and it is possible that errant language in some government briefs may have nurtured that assumption. But even if that assumption had produced a substantial body of precedent (which it has not, see *id.* at 42a-43a (Garza, J., dissenting)), the courts have an obligation, when squarely faced with the issue, to interpret Section 113(f)(1) in light of its plain terms. See, *e.g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("If we do our job of reading the statute whole, we have to give effect to this plain command, * * * even if doing that will reverse the longstanding practice under the statute."); *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 300 (1995) ("Age is no antidote to clear inconsistency with a statute." (citations omitted); see also *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

The en banc court's policy considerations (Pet. App. 31a-33a) provide no basis for construing Section 113(f)(1) contrary to its plain terms. As a practical matter, the uniform view of the courts of appeals that a responsible party can seek reimbursement for response costs under CERCLA only through a contribution action, when coupled with Congress's decision to authorize contribution under CERCLA only "during or following" a Section 106 or 107(a) action or after settlement, imposes a coherent structure on the allocation of CERCLA response costs and a sensible limitation on CERCLA contribution actions. That construction makes clear that CERCLA does not create a federal cause of action under which responsible parties may sue each other at any time for costs they have incurred in cleaning up hazardous substances. Rather, a responsible party that satisfies its CERCLA liability to the government, through settlement or judgment, may obtain contribution from other responsible parties within a statutorily prescribed limitation period.

That construction also puts CERCLA in alignment with the traditional legal rules governing joint liability and contribution. See pp. 17-19, *supra*.[12]

To be sure, Congress might in the future make a legislative judgment that responsible persons who engage in cleanups in the absence of a Section 106 or 107(a) action or a qualifying settlement should also be able to recover their costs from other responsible persons. Such a remedy could further Congress's objective of facilitating "brownfields" cleanup and redevelopment.[13] But the court of appeals erred

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[12] See Restatement (Third) of Torts § 23 cmt. b (2000) ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment."). Section 113(f) does not prevent a responsible party from cleaning up a CERCLA site voluntarily and apportioning the costs among other responsible parties by first entering into a settlement to resolve its liability to the United States or a State. If a party enters into such a settlement, it would then be immune from contribution claims regarding matters addressed in the settlement, and it would have the express right to seek contribution from non-settling responsible parties, based on its discharge of the joint liability through the settlement. See CERCLA § 113(f)(2) and (3), 42 U.S.C. 9613(f)(2) and (3); see also 40 C.F.R. 300.700(g). Alternatively, a responsible party may also pursue the cost recovery mechanisms available under state law. See, *e.g.*, Tex. Health & Safety Code Ann. § 361.344 (West 2001).

[13] There are many contaminated sites nationwide—by one estimate, as many as 450,000. See U.S. General Accounting Office, *Community Development: Local Growth Issues—Federal Opportunities and Challenges* (RCED-00-178) 118 (Sept. 2000). Because government resources are limited, private parties have played, and will continue to play, a prominent role in cleaning up many of those sites. EPA estimates that state and local brownfields programs have yielded more than $5.1 billion in largely private funding for brownfields cleanup and redevelopment. In many instances, those cleanups have proceeded with minimal government involvement. A future Congress could accordingly conclude that allowing responsible parties to obtain cost recovery from other responsible parties in the absence of a CERCLA action or settlement, and subject to appropriate limitations, may result in more efficient and cost-effective cleanups at many of those sites.

in arrogating to itself the authority to override the statutory text on the basis of its own assessment of policy considerations.

Indeed, piecemeal amendment of CERCLA by the courts would have undesirable consequences. For example, the en banc court of appeals' construction of Section 113(f)(1) poses the risk that the contributing party may be subject to double liability. Under CERCLA, a responsible party's voluntary cleanup does not discharge the underlying liability to the United States or a State except as provided in a settlement or federal court judgment to which the United States or a State is a party. See 42 U.S.C. 9613(f)(2); 40 C.F.R. 300.700(g). Hence, a party that is ordered to pay "contribution" in the absence of such a resolution with the government has no guarantee that its payment will discharge its liability, and it remains potentially subject to a future federal or state cost recovery action if any relevant government agency later investigates and determines that the voluntary conduct is inadequate or improper. Indeed, the traditional strictures on contribution are designed to eliminate the prospect of double liability.[14]

Furthermore, the court of appeals' decision effectively creates a new federal cause of action that is not specifically authorized in CERCLA's text. This Court has often warned against the judicial recognition of private rights of action not specifically authorized by Congress. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 287-288 (2001); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001); *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002). In particular, the Court has specifically refused to infer federal rights of

[14] See, *e.g.*, Restatement (Third) Torts § 23 (2000), Reporter's Note, cmt. b ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought. See Uniform Contribution Among Tortfeasors Act § 1(d). Otherwise the person against whom contribution is sought would be subject to double liability.").

contribution. See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981); *Northwest Airlines*, 451 U.S. at 91-95. And it has shown great reluctance to extend existing remedies beyond the limits that Congress has expressly imposed. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 208 (2002); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979).

The Court's reluctance to extend statutory remedies rests in large part on "deference to the supremacy of the Legislature." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). Ultimately, the task of reconciling the competing policy interests should be left to Congress. Congress expressed its current policy through Section 113(f)(1)'s text, which adopts the traditional practice of allowing a party to seek contribution only if that party is itself subject to suit. The judiciary's task is "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 126 (1989). The congressional judgment set forth in the statutory text accordingly should control. See, *e.g.*, *Rodriguez*, 480 U.S. at 525-526; see Pet. App. 44a-45a (Garza, J., dissenting). As this Court stated in the context of CERCLA's provisions respecting recovery of attorney's fees, expanding the scope of existing remedies "is a policy decision that must be made by Congress, not the courts." See *Key Tronic*, 511 U.S. at 819 n.13 (quoting *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2004

Supreme Court, U.S.
FILED
APR 8 2004
OFFICE OF THE CLERK

No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner,*

v.

AVIALL SERVICES, INC., *Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATLANTIC RICHFIELD COMPANY, BLUEWATER NETWORK, FEDERAL MOGUL CORP., CRANE CO., LFR, INC., THE SOURCE GROUP, INC., AND GEOMATRIX CONSULTANTS, INC. AS *AMICI CURIAE* SUPPORTING RESPONDENT

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ON WRIT OF CERTIORARI
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BRIEF FOR ATLANTIC RICHFIELD COMPANY, ET AL. AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICI CURIAE[1]

Amici have diverse interests in cleanup of contaminated property under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*, but all share the view that CERCLA should be interpreted to encourage and not penalize responsible parties who step forward to undertake prompt and environmentally protective cleanups of contaminated sites. All share an interest in an interpretation of CERCLA that is consistent with its language and purpose and the long-standing policy and practice of the United States Environmental Protection Agency ("EPA").

[1] In accordance with Rule 37.6, *amici curiae* certify that counsel for a party did not author this brief in whole or in part and that no entity other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

Atlantic Richfield Company, Federal Mogul Corporation and Crane Company are potentially responsible parties at numerous CERCLA sites, and have frequently expended funds to clean up contaminated property in reliance on the right to seek contribution from other responsible parties under CERCLA. Accordingly, these corporations have a substantial interest in prompt, efficient and effective cleanups under CERCLA, without the requirement of unnecessary litigation, and in the availability of contribution for responsible parties who have incurred cleanup costs.

Amicus Bluewater Network is an environmental organization with membership throughout the United States dedicated to championing innovative solutions and inspiring individuals to protect the earth's finite and vulnerable ecosystem. It and its members have an interest in ensuring that responsible private parties will continue to undertake cleanups of contaminated sites that protect the environment.

Amici LFR, Inc., the Source Group, Inc., and Geomatrix Consultants, Inc. are engineering and consulting firms that regularly conduct and oversee cleanup of contaminated properties under CERCLA. They have a substantial concern that the position advanced by Petitioner could result in a less efficient cleanup process under CERCLA.

SUMMARY OF ARGUMENT

The overarching objective of CERCLA is to facilitate the prompt cleanup of contaminated sites at which there have been releases of hazardous substances, so as to protect human health and the environment. CERCLA Sections 107(a) and 113(f) encourage private persons to undertake prompt cleanup action by allowing persons who incur cleanup costs to seek contribution from parties who also have liability for contamination at the site, but who have not acted in the same timely manner. Petitioner argues that contribution should only be available to persons who wait for the government to bring an enforcement action against them, or who have settled with the government. If this position

were adopted, it would severely undermine CERCLA's core objectives by discouraging private parties from undertaking prompt, high-quality cleanups of contaminated sites. It would instead encourage those parties to delay cleanup until the government files suit, so that they do not lose their ability to seek cost recovery or contribution from any other parties who may be liable for cleanup costs at the same site. This would lead to unnecessary litigation, which would both divert scarce governmental resources from more pressing needs and increase the cost of the Superfund process for parties who have, until now, been willing to undertake cleanups without litigation. And the result would compromise the overall fairness of the CERCLA liability scheme by penalizing those who undertake cleanups voluntarily and rewarding those who do not.

Not only is Petitioner's position at odds with the objectives of CERCLA, it is also at odds with the statute's specific terms. When viewed in the context of the entire statute, this interpretation is premised on a tortured reading of CERCLA, which ignores the plain language of Section 107 allowing any private party who undertakes cleanup to recover costs from other liable parties. It is also at odds with this Court's decision in Key Tronic Corp. v. United States, 511 U.S. 809, 812 (1994), which makes clear that private parties undertaking cleanup can rely on Section 107 and that Sections 107 and 113 must be read together. A review of the history of the these provisions demonstrates quite clearly that Congress was seeking to create a broad cost recovery and contribution scheme, not the very narrow and wholly illogical one argued for by Petitioner.

Further, the position taken here by the United States as *amicus* is both incorrect as a matter of law, and also directly contrary to positions it has taken again and again in briefs, including to this Court, in regulations, and in other public pronouncements.

Accordingly, the Court should affirm the *en banc* decision of the Fifth Circuit, which is fully consistent with

both the words Congress wrote and the objectives it sought to achieve in enacting and amending CERCLA.

ARGUMENT

I. THE POSITION ARGUED FOR BY PETITIONER WOULD SUBSTANTIALLY UNDERMINE THREE IMPORTANT POLICY OBJECTIVES OF CERCLA

A. The Enforcement Objectives of CERCLA

In 23 years since CERCLA's enactment, three fundamental goals have provided the basis for EPA's implementation of the statute, and each of these goals is reinforced repeatedly in the text of the statute, its legislative history, and judicial decisions. These three goals have been (1) to promote rapid and effective cleanup of contaminated property by private parties, (2) to provide greater fairness in the joint and several liability scheme of CERCLA, and (3) to reduce litigation and transaction costs. See, e.g., EPA, Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals (June 3, 1996), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/orphan-share-rpt.pdf (stating that goals of enforcement policy reform are "to provide greater fairness, reduce litigation and transaction costs, and promote private party cleanup of Superfund sites."). Each of these three goals, long recognized as integral parts of the statutory purpose, would be substantially undermined if Petitioner's narrow interpretation of CERCLA contribution rights were accepted by this Court.

In this section, we first expand on each of these three purposes and its fundamental importance to the effective implementation of CERCLA, and then demonstrate how each would be severely harmed if Petitioner's interpretation of the statute were adopted.

1. Encouraging Private Party Cleanup

Of the three CERCLA enforcement purposes discussed here, promoting prompt and effective cleanup of sites by private parties is in many ways the most important, because cleanup of contaminated sites is why CERCLA exists. And it is no surprise that this purpose has been reiterated again and again, because Congress emphasized the importance of encouraging private party cleanup in the initial 1980 enactment of CERCLA by clearly providing for recovery of response costs by private parties under Section 107. See Key Tronic, 511 U.S. at 816.

Congress also emphasized the goal of encouraging private party cleanup when debating the 1986 SARA amendments, which amended CERCLA Section 113 to expressly provide a right of contribution. Legislative sponsor Representative Lent stated: "I am especially proud of a key groundbreaking structural reform that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create." 131 Cong. Rec. 16573 (1985). The House Report states that a goal of the new provisions is to "encourage private party settlements and cleanups." H.R. Rep. No. 99-253, pt. 1, at 80 (1985).

During Congressional hearings on the SARA amendments, Assistant Attorney General Habicht also articulated the importance of encouraging private party cleanups and encouraging persons to undertake cleanup without an EPA enforcement lawsuit:

> As the Government's goals in this enforcement process become clear, we're confident that the reasonable parties around the country, who've already demonstrated a recognition of what the rules are and what the goals of the Government are, will come forward and will become participants in the cleanup process.

Reauthorization of Superfund, Hearings Before the House Subcommittee on Water Res. of the Comm. on Public Works

and Transp., 99th Cong. 549 (1985) ("Water Resources Hearings").

Congress recently reemphasized the goal of encouraging private party cleanup when it passed the Small Business Liability Relief and Brownfields Revitalization Act. See Pub. L. No. 107-118, 115 Stat. 2356 (2002). These amendments to CERCLA sought, among other things, to stimulate voluntary cleanup programs at the state and local level by providing grants to facilitate private party cleanup of so called "brownfield" sites, contaminated properties with the potential for productive reuse and development. Id. at § 211. The Senate committee report accompanying this legislation recognized the significance of voluntary cleanup to the overall contaminated property problem, observing that "[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program." S. Rep. No. 107-2, at 15 (2001).

That same Senate committee report referred with approval to existing EPA policy for reaching Memoranda of Agreement ("MOA") with states on voluntary cleanup programs. Id. In 1997 guidance on drafting MOA with states, EPA clearly indicated its belief that the availability of contribution under CERCLA was an important component of voluntary cleanup programs. See Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (September 9, 1997). The guidance demonstrates EPA's position that a private party taking action under a state voluntary cleanup program can bring a contribution claim against other liable parties under CERCLA Section 113, as long as cleanup complied with the National Contingency Plan ("NCP"): "The MOA should make clear to any private party that recovery of response costs under CERCLA will require that the cleanup action meet the requirements outlined in the National Contingency Plan." Id. at 47,499.

As this EPA guidance indicates, a broad right of contribution is essential for encouraging safe and effective private party cleanup of CERCLA sites. As with the other policy objectives discussed here, this goal is not new. The necessity of broad contribution was emphasized when President Reagan transmitted his administration's proposed Superfund amendment bill, a precursor to SARA, to Congress in 1985. In the explanatory material accompanying the bill, it was acknowledged that "[p]rivate parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from others." H.R. Doc. No. 99-32, at 73 (1985).

2. Reducing Litigation and Transaction Costs

Reducing litigation and transaction costs has long been another important objective of the CERCLA enforcement scheme. During hearings that led to the SARA amendments in 1986, members of Congress expressed concern about the rising legal and transaction costs of the Superfund program. For example, there was the following exchange between Senator Simpson and Assistant Attorney General Habicht:

> Senator Simpson: On this question of transaction costs at sites, which is the lovely phrase which I guess refers to legal and other fees expended during the process, transaction costs, are we seeing the point that legal fees are greater than cleanup costs at some of those sites already? If that is so, is that a good use of our national resources, and what does it imply about the success of Superfund if that is happening.
>
> Mr. Habicht: Senator, I don't have the exact costs of the litigation. I think it is absolutely fair to say, and I feel strongly and I know it represents the administration's view, that litigation is not the most desirable way of resolving issues . . . .

Superfund Improvement Act of 1985, Hearing Before the Senate Comm. on Env't and Public Works, 99th Cong., at 52-53 (1985).

This theme is repeated throughout the SARA legislative history. For example, Mr. Habicht also testified that the success of the Superfund enforcement program rested in part on its ability to "discourage unnecessary and costly litigation."[2] Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearing before the House Subcom. on Admin. Law and Governmental Relations, Comm. on the Judiciary, 99th Cong., 38 (1985). Furthermore, the views expressed by the Administration were shared by congressional sponsors of the legislation, such as Representative Lent, who described the House bill as one "that will take the toxic waste cleanup effort out of the courtrooms of America and to the abandoned waste sites where it belongs." 131 Cong. Rec. 16573 (1985).

3. Facilitating Fairness

The government has long argued that CERCLA can impose liability that is joint and several, and that the government can seek to hold a subset of the potentially liable parties at a site responsible for all of the cleanup costs. See, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983). While the government has argued that joint and several liability, while not explicitly set out in the statute, is necessary to achieve programmatic goals, there has also been a recognition that a broad right of contribution was necessary for a fair enforcement process. Assistant Attorney General Habicht emphasized in his Congressional testimony on SARA that "an enforcement process has to be fundamentally fair." Water Resources Hearing at 546. In other Congressional testimony, Mr. Habicht elaborated on the centrality of contribution rights to the statute's fairness,

[2] While a broad right of contribution could, in theory, also increase litigation, the expectation is that most contribution claims can be resolved without protracted litigation. If some litigation is necessary to fairly allocate cleanup costs between numerous responsible private parties, such litigation furthers the overall goals of CERCLA with little, if any, added expense to the government.

stating very simply: "[t]he fairness of a joint and several liability scheme depends upon the clear availability of contribution." Oversight Hearings Before the House Subcomm. on Admin. Law and Governmental Relations, Comm. on the Judiciary, 99th Cong. 51 (1985).

Similarly, judicial decisions have long recognized the importance of contribution to the fairness of a joint and several liability scheme. For example, in Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985), a decision that preceded the 1986 SARA amendments adding Section 113(f), the district court found that there was a right to contribution under CERCLA and that such a right was essential to the fairness of the liability scheme created. The court cited Dean Prosser's recognition that, "contribution is an integral component of joint and several liability." Id. at 1490 (citing Prosser, Law of Torts § 50 (4th ed. 1982)). The court in ASARCO also cited this Court's recognition of the fairness of allowing contribution among parties who have joint and several liability. Id. (citing Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981)).

B. Petitioner's Position Undermines These Objectives

The interpretation argued for by Petitioner would result in a CERCLA enforcement scheme that substantially diminishes incentives for voluntary cleanups by private parties, increases litigation costs, and is less fair. The United States does not dispute these points, but instead contends (at pp. 26-28) that, given what it perceives as clear statutory language, these arguments should be made to Congress in the context of a possible legislative enhancement, not to this Court in deciding the interpretation of the existing statute. But in interpreting the statutory language, the overarching objectives of the statute are of great significance. It is a black letter rule of statutory construction that a statute should not be interpreted in a manner that would be irrationally at odds with the very purposes of the statute. See, e.g., Comm'r of Internal Revenue v. Engle, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which

can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."). Petitioner's view of the statute is exactly such an irrational interpretation.

In examining the effect of Petitioner's position—that contribution is only available under CERCLA to parties who have been sued or who have settled with EPA—it is useful to consider three very different contexts where this interpretation would produce absurd results that could not possibly have been intended by Congress.

1. Voluntary Cleanups

The first category is the type of situation presented by the facts of this case: a party that cleans up a site without first being sued by the United States to undertake the cleanup. Such a cleanup might be undertaken by a private party for any number of reasons: the party knows it is liable for some part of the contamination and desires to promptly reduce risks to human health or the environment; the party desires to conduct the cleanup before the situation is exacerbated by contaminant migration or the passage of time; the party desires to avoid liabilities to third parties who may be affected by migrating contamination; or the party wants to take advantage of incentives available for participation in a State voluntary cleanup program. All of these reasons reflect goals that were specifically articulated by Congress and reinforced by EPA policy, and they all support CERCLA's ultimate goal of achieving prompt cleanup. Yet in all of these situations, the party undertaking cleanup would, in

Petitioner's view, have no ability to recover its costs or seek contribution from other liable parties under CERCLA.

Such a result is on its face not fair. The party doing the cleanup may have been only a small contributor to the environmental conditions at the site, or may have liability as the present site owner without having contributed to the contamination at all.[3] Yet despite the fact that there may be other clearly liable and viable parties from whom contribution for the cleanup costs could be sought, under Petitioner's view the party actually doing the cleanup has no ability to sue those other parties. The entire costs of the cleanup would fall on the party who voluntarily remediates the site, and the other parties could escape responsibility altogether.[4] This may be an example of the expression "no good deed goes unpunished." It is certainly not an example of a fair enforcement scheme.

Petitioner's interpretation would also inevitably result in an increase of litigation and transaction costs. A party who wants to preserve its contribution rights would have a strong incentive to wait to do the cleanup until it has been sued, at which point both it and the government would have to incur legal costs. The government would be forced to use its scarce resources to develop a case and be prepared to litigate it, and a party that was willing to do the cleanup without government compulsion would be forced to wait for litigation before taking any cleanup action. While it might seem that the litigation would be simple, and settlement would quickly follow, experience teaches that such litigation is rarely simple, and once it commences the interest of the

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[3] Present owners of contaminated sites are often liable for those sites even if their actions did not contribute to the contamination in any way. While there are defenses to liability available for some owners of contaminated property, those defenses are not always viable, even for owners who have done nothing to contribute to the contamination. See 42 U.S.C. §§ 9601 (35), (40).

[4] Although a state remedy might be available, that option is limited, as discussed further in Section I.B.2, note 7, *infra*.

government and all parties to protect their legal positions can lead them down a road far away from, not toward, cleanup and settlement. Petitioner's interpretation would compel the government to litigate against defendants who simply want the ability to seek contribution from other liable parties. Litigation would be complicated and more expensive for the government than a voluntary cleanup, and it would inevitably delay the cleanup process.

Alternatively, a party wanting to undertake a cleanup could try to enter into an administrative settlement with the United States, but that process will also result in an increase, perhaps significant, in negotiation and other transaction costs to that party and the United States. Settlements under CERCLA are not *pro forma* matters, but are governed by the detailed requirements of Section 122 of the statute, 42 U.S.C. § 9622, which impose limitations and procedural requirements on how EPA enters into such entitlements. EPA also utilizes complex and lengthy model settlement documents that cannot be negotiated simply and inexpensively.[5]

Senior EPA officials have recognized that there would be increased transaction costs and adverse effects were Petitioner's position adopted. For example, Bill Muno, who has served for many years as the Superfund Director for EPA's largest regional office, has publicly stated that a ruling from this Court adopting Petitioner's position could force EPA to divert limited Superfund enforcement money to sites that liable parties are already remediating voluntarily, thus harming Superfund enforcement and the goal of achieving site cleanups. See Inside EPA Environmental

[5] For example, EPA's Model Consent Decree for agreements to implement remedial action is over 50 pages long with 127 separate provisions. See EPA, Model RD/RA Consent Decree (May 2001), www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf.

Policy Alert, *Aviall May Divert Superfund Enforcement Fund, EPA Official Says* (February 4, 2004).

Finally, the most unfortunate effect of the acceptance of Petitioner's position would be that fewer voluntary cleanups would be done. Parties who now have an incentive to do cleanups without being sued will analyze the costs and benefits of doing such cleanups differently, and in many cases will not do them. If Petitioner prevails, the net effect will be that there will be more contaminated sites in the United States three, five, and ten years from now than if Respondent prevails.

Such a result would also have a devastating effect on the formal voluntary cleanup programs that many states have adopted with encouragement from EPA, like the Texas program that was utilized by Respondent in this case. Moreover, as mentioned above, EPA has long made it clear that parties participating in such programs should be able to seek recovery of costs from other liable parties under CERCLA. See 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) ("EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination."). That the United States has decided in this case to completely undermine EPA's long-standing position will greatly weaken EPA's ability to encourage voluntary cleanups under any program.

Not only is the availability of contribution an important incentive for private parties to conduct cleanups, but it is also a powerful incentive for them to conduct good and thorough cleanups. CERCLA provides that a private party can only recover response costs that are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); see also, Morrison Enter. v. McShares, Inc., 302 F.3d 1127, 1135-36 (10th Cir. 2002). The NCP is part of CERCLA's implementing regulations, and it contains detailed requirements for how cleanups are to be conducted. See 40

C.F.R. pt. 300. A party that knows it will have to have to demonstrate compliance with the NCP to recover its costs from other liable parties has a strong incentive to conform to the NCP, which helps ensure that the cleanup is protective of human health and the environment. A party that knows it cannot recover its costs under CERCLA will not have the same incentive to comply with the NCP.

In 1988, EPA recognized this incentive and added provisions to the NCP that were intended to make it easier for a private party undertaking cleanup to know how to comply with the NCP. EPA stated "that providing a list of requirements to be complied with in order to be consistent with the NCP will enhance the probability of a successful cost recovery action, thus providing an incentive to other persons to undertake response actions." 53 Fed. Reg. 51,394, 51,462 (Dec. 21, 1988).

2. Respondents to Section 106 Orders

Section 106 of CERCLA allows EPA to issue orders to liable parties to undertake cleanup. This is a powerful tool, and one that EPA uses frequently. EPA guidance encourages the use of such orders so that liable parties and not EPA will undertake cleanup. EPA guidance also encourages the issuance of such orders to a subset of all the liable parties at a site, based on an assertion of joint and several liability, so that enforcement of the order by EPA will be manageable. See EPA, Documentation of Reason(s) for Not Issuing CERCLA Section 106 UAOs to All Identified PRPs (Aug. 2, 1996), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf. What happens, then, if there are 60 liable parties at a site, EPA issues such an order to 30 of those, and only 10 of those agree to comply with the order and in fact undertake the entire cleanup? Can those 10 sue the 20 non-compliers and the 30 non-recipients for contribution?

The Fifth Circuit panel decision recognized the absurdity of denying contribution in such a case, and held that a Section 106 administrative order would qualify as a civil

action for purposes of Section 113(f), thereby providing a predicate for contribution. See Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F. 3d 134, 140 n.5 (5th Cir. 2001). But the United States in its *amicus* brief here (at 22, n. 11) argues that such an order is not a civil action, meaning the compliers would have no CERCLA contribution claim. It is inconceivable how Congress could have intended such a result.[6]

Certainly it is grossly unfair. A small group of compliant parties would be forced to shoulder the entire burden of the cleanup, and the non-compliers and those whom EPA chose not to pursue at all would get a free ride. The result would be even more unfair, and quite strange, if the United States were to sue the non-compliers in federal court and they were ordered by the court to comply with the Section 106 order and participate in the cleanup. Those initial non-compliers—who only performed the cleanup after being sued and ordered by a court to do so—would have a contribution claim for their costs against the non-recipients. And the original compliers, who did precisely what EPA wanted them to do, would have no federal contribution claim.

It is true that in such a situation the compliers with the order might have a contribution claim under state law. But the availability of such a remedy is limited and varies by state.[7] Even if such a remedy were available, the

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[6] This position also represents an unequivocal reversal of arguments the United States has repeatedly advanced before, as discussed further below.

[7] As the *en banc* court of appeals recognized below, the availability of contribution under state law varies widely. See Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F. 3d 677, 690 n. 28 (5th Cir. 2002) (en banc). Some states allow contribution claims only after judgment has been entered on the underlying liability in a judicial proceeding. Id. Although many states have adopted some version of one of two uniform contribution acts, the Uniform Contribution Among Tortfeasors Act and the Uniform Comparative Fault Act, the availability of such claims will vary greatly depending on the particular state law and the facts of each case. Furthermore, a recent nationwide survey of state Superfund

Footnote continued on next page

contribution claims of the compliers would be adjudicated under state law in the state court, and the contribution claims of the non-compliers would be decided in federal court under federal law, a recipe for total confusion.

Again, the result argued for by Petitioner could increase litigation and transaction costs, as Section 106 order recipients would have an incentive to disobey the order and wait for the United States to sue them. In doing so, they would run the risk of claims for penalties and punitive damages under provisions which were intended to encourage compliance. See 42 U.S.C. §§ 9606(b), 9607(c)(3). Surely, a party should not be put in a position where it is penalized and subject to punitive damages for failure to comply with an order, and also penalized, by loss of its contribution rights, when it fully complies with the same order. Compliance should not trigger a penalty.

3. Demand Recipients

A third situation which would be impacted by Petitioner's argument is that of potentially liable parties who receive cost demands from EPA, where EPA undertakes cleanup itself, and pay the amount demanded. EPA is encouraged by CERCLA to issue such demands, because interest on costs EPA has incurred only begins to run once demands are issued. See 42 U.S.C. § 9607(a) (interest runs from the later of "the date payment of a specified amount is demanded in writing" and the date of the expenditure); see also, In re Bell Petroleum Services, Inc., 3 F.3d 889, 908 (5th Cir. 1993).

Footnote continued from previous page

programs by the Environmental Law Institute found that of the 36 states employing a joint and several liability scheme for contaminated property cleanup costs similar to CERCLA, only 11 provide an explicit right to allocate cleanup costs to other liable parties. See Environmental Law Institute, *An Analysis of State Superfund Programs*, 34 (2002). Because of barriers such as these, contribution under state statutes often will not provide an adequate remedy.

As with Section 106 orders, the party that cooperates with EPA would be penalized by losing its contribution rights because it paid before it was sued. Thus, the party that does what the government has asked it to do loses an important right of contribution, while the parties who do not pay the demand and are instead sued retain a contribution right. Such a result, again, would increase litigation and transaction costs. And while it will not reduce private party cleanups, it will delay the return of money to the Superfund that could be used to clean up other sites.

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The following chart summarizes how, in these three situations, Petitioner's interpretation would deny contribution rights to those who behave the way the government wants them to, and allow contribution for those who do not:

	Contribution Available	**No Contribution Available**
Voluntary Cleanup	Ignore contamination	Clean up property
EPA § 106 Order	Disobey until sued	Comply with order
EPA Cost Demand	Refuse until sued	Pay the demand

Petitioner's proposed interpretation asks this Court to hold that Congress intended these illogical results. Surely, if there were any reading of the statute to avoid such a result, that would be the preferred reading. As the next section shows, not only is there such a reading, it is the best reading of the statute, and one that the United States has previously endorsed.

II. PETITIONER'S INTERPRETATION IS CONTRARY TO THE PLAIN STATUTORY LANGUAGE OF CERCLA

A. The Plain Language of CERCLA § 107

The plain meaning of Section 107 permits the government or "any other person" to bring a cost recovery claim under CERCLA. See 42 U.S.C. § 9607(a)(4)(A)-(B). As Judge Posner has put it, "[t]he statute is clear that whoever...incurs costs in cleaning up a contaminated site can seek to recover them from any responsible person..." Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 748 (7th Cir. 1993). This Court recognized as much in Key Tronic, when it held that "§ 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs . . . ." Key Tronic, 511 U.S. at 818. In Key Tronic, the Court allowed a private party not only to seek contribution for costs it paid the government, but for costs it had itself incurred in locating other potentially liable parties. Id. at 819-20. Although the opinion of the Court was that this private right of action was implied, Justice Scalia argued in dissent, based on "the plain language of these provisions," that private litigants clearly have an express cause of action under Section 107. Id. at 821-22 (J. Scalia dissenting in part, joined by J. Blackmun and J. Thomas).

This could well be the end of the inquiry. CERCLA allows private parties who undertake cleanup to sue liable parties for cost recovery, and the statute does not restrict those who can assert such claims to parties who are not themselves liable under Section 107. Section 107 refers to costs incurred by any other person, and a liable party is certainly that. Petitioner's argument depends on the proposition that Section 107 should be read contrary to its language to prohibit liable parties from seeking cost recovery, and Section 113(f)(1) should be read to exclude contribution claims by parties who haven not been sued.

Before addressing this argument, it is useful to review the state of the law when SARA was enacted.

B. The Law Before and After SARA

It was clear, prior to the enactment of SARA in 1986, that liable parties who conducted cleanup could successfully sue other liable parties pursuant to Section 107(a)(4). For example, in City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982), the City of Philadelphia, itself a liable party, sued other liable parties under Section 107(a)(4) for the City's costs in cleaning up a landfill. The defendants argued that because the City was liable, it was precluded from relying on Section 107. The district court rejected that argument, "[b]ecause such preclusion is not compelled by the language of CERCLA, by its legislative history, or by the environmental objectives which it is designed to achieve..." Id. at 1142. Other courts that recognized a pre-SARA right of liable parties to sue other liable parties under Section 107 include Wickland Oil Terminals v. Asarco, Inc., 792 F. 2d 887 (9th Cir. 1986); NL Indus., Inc. v. Kaplan, 792 F. 2d 896 (9th Cir. 1986); and Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984). EPA also recognized such a right in its pre-SARA promulgation of the NCP. See 50 Fed. Reg. 47, 912, 47,934 (Nov. 20, 1985) (discussing NCP requirements for private party cost recovery).

When Congress amended CERCLA in 1986, it was concerned, as discussed above, about increasing incentives for private party cleanup, and there is not the slightest indication that it intended to take away the existing right of private party cost recovery under Section 107. To adopt Petitioner's view would be to hold that Section 113(f)(1) implicitly repealed an existing right under 107. However, repeals by implication are not favored, and the intent of Congress to repeal must be manifest. See Rodriguez v. United States, 480 U.S. 522, 524 (1987); San Francisco v. Assessment Appeals Bd., 122 F.3d 1274, 1276 (9th Cir. 1997).

Far from expressing an intent to narrow the rights of parties who conducted or financed cleanups, Congress in enacting SARA was interested in expanding those rights. One issue that had arisen pre-SARA was whether a party that was sued for cost recovery or to conduct a cleanup, but had not itself undertaken a cleanup, had a right to contribution, and some pre-SARA courts had found such a right to exist. See, e.g., Violet v. Picillo, 613 F.Supp. 1563, 1573 (D.R.I. 1985). In SARA, Congress added explicit contribution language simply to clarify and confirm that existing right. See S. Rep. No. 99-11, at 44 (1985); H.R. Rep. No. 253, 99th Cong., at 18-19 (1985). See also, Aviall, 312 F. 3d at 684 (citing Congressional reports).

In this process, much attention was given to the question of when that contribution right could be asserted. The United States was initially concerned about having a contribution action appended to its enforcement action, which would complicate and delay the resolution of the government's claims. Therefore, the initial administration proposal provided that "[i]n any civil or administrative action under [Section 107 or 113], any claims for contribution or indemnification shall be brought only after entry of judgment or date of settlement in good faith." H.R. Doc. No. 99-32, at 23 (1985). As proposed, this change would have allowed "the government to limit the number of parties in its actions, so that litigation could be conducted in a more efficient and expeditious manner." Id. at 74. Eventually, the proposed legislation was changed to make it clear that a defendant sued under CERCLA could seek contribution even in the same action in which it itself was sued—in other words, the contribution claim could be brought "during or following" the government's action. But again, there is no indication that this reference to "during or following" was intended to limit contribution rights. To the contrary, Section 113(f)(1) makes clear that it does not "diminish the right of any person to bring an action for

contribution in the absence of a civil action under section [106 or 107]." 42 U.S.C. § 9613 (f)(1).

In other words, Congress initially created an incentive for private party cleanups by creating a right of private party cost recovery in 1980, and then it expanded the rights of cooperating private parties with the 1986 SARA amendments.

C. The Effect of Section 113(f)

Petitioner asserts that Congress eliminated private party cost recovery rights by the promulgation of Section 113(f)(1). This argument, and that of the United States, is premised on the fact that most courts of appeals have interpreted the statute to prohibit parties who themselves are potentially liable under CERCLA from suing other liable parties solely under Section 107, and have instead required that they proceed under Section 113(f). See, e.g., Pinal Creek Grp. v. Newmont Mining Corp., 118 F.3d 1298, 1306 (9th Cir. 1997); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409, 415 (4th Cir. 1999).

This judicial interpretation of Section 107, which finds no direct support in the statutory language, has been based almost entirely on the premise that Congress intended such parties to recover cleanup costs from other liable parties through a contribution claim under Section 113. But in these cases, the concern of the courts has been uniformly how such liable parties could seek cost recovery, not whether they could at all. Courts have been concerned that calling such a cost recovery action something other than "contribution" could allow for assertion of joint and several liability by such liable parties or could allow circumvention of the protection from contribution claims given to settlers under section 113(f)(2). See, Axel Johnson, 191 F.3d at 415-16; Centerior Service, 153 F.3d at 352, n.11. But none of these decisions suggested that by recasting the claim as a contribution claim, the claim would be lost altogether. To the contrary, in these

cases that precluded direct Section 107 actions by liable parties, the courts assume that Section 113(f) actions are available. See, Bedford Affiliates v. Sills, 156 F. 3d 416, 425 (2d Cir. 1998) ("Bedford instead must rely on a claim for contribution provided for in CERCLA § 113 (f)(1)"); Pinal Creek, 118 F. 3d at 1301 ("[t]his duality [between Sections 107 and 113] is best implemented by permitting a PRP who has incurred cleanup costs to assert only a contribution claim against other PRPs"); Axel Johnson, 191 F. 3d at 415 (private parties "who are potentially responsible for cleanup costs under § 107 cannot bring § 107 cost recovery actions; rather, such parties 'must seek contribution' under § 113"). These courts provide no indication that they intended to eliminate substantive rights under CERCLA for entire categories of private plaintiffs by characterizing cost recovery claims as contribution claims.

D. The United States' Changing Position

The United States notes that it has consistently argued in favor of this prevailing counter-textual interpretation of Section 107. See Brief of United States at 20, n.9 (citing Brief of United States as *Amicus Curiae* in Support of Defendants-Appellants in Pinal Creek at 10 (9th Cir. 1996) ("Ninth Circuit Pinal Creek Brief")). However, the United States has advanced this argument in the past based on the express argument that all liable parties who incurred cleanup costs were entitled to seek contribution under Section 113.

The Ninth Circuit Pinal Creek Brief is very illuminating. Pinal Creek was a cost recovery action brought by a liable party that had performed a voluntary cleanup—essentially the same situation as that presented here. The United States argued that such a party could seek contribution under Section 113 of CERCLA. The United States asserted that the issue before the court was "the nature of action available to an admittedly liable party that has incurred CERCLA response costs without any judgment, administrative order or settlement compelling cleanup." Ninth Circuit Pinal Creek Brief at 10. The United States closed the summary of its

argument by stating that "[t]he Superfund statute already has built-in incentives to encourage voluntary cleanups: they are less expensive, involve less government control and may result in fair share allocations through Section 113 contribution actions." Id. at 12.

When opposing the petition for writ of certiorari to this Court in Pinal Creek, the United States again made its position clear that a party performing voluntary cleanup could bring a CERCLA contribution claim. In its brief to this Court, the United States stated that "[t]he court of appeals was properly skeptical of the contentions, pressed by petitioners and their *amici*, that its holding would discourage voluntary cleanups." Brief of United States as *Amicus Curiae* Opposing Granting of *Certiorari* in Pinal Creek at 14 (U.S. 1998). The United States further emphasized this point by asserting that "[t]he right to contribution provides a strong additional incentive to engage in a voluntary cleanup," and that, "[a]s the court of appeals recognized, the courts are authorized to take into account a responsible party's cooperation with cleanup efforts when equitably allocating liability among responsible parties under Section 113(f)(1)." Id. at 15.

In the Centerior Service case, the United States again asserted that a liable party could not sue under Section 107. The liable party had received a Section 106 administrative order from EPA, but it had not been sued in a civil action. The United States, while asserting that there should be no Section 107 cost recovery action for such a party, acknowledged that there would certainly be a contribution action under Section 113. In its brief, the United States framed the question before the court of appeals as "the nature of the action available to a potentially responsible party that has incurred CERCLA response costs pursuant to an uncontested CERCLA § 106(a) Administrative Order." Brief of Defendants-Appellees Secretary of Defense, Secretary of Veterans Affairs, and Administrator of National Aeronautics and Space Administration in Centerior Service,

at 6 (6th Cir. 1997) ("Centerior Service Brief"). The answer to this question, as the United States saw it then, was that "such parties are limited to an action for contribution governed by CERCLA § 113." Id. And as in Pinal Creek, the United States argued that "CERCLA also authorizes private parties to bring an action to recover response costs which they incur at a site, voluntarily or under compulsion by the government." Id. at 2.

In fact, the plaintiffs in Pinal Creek and Centerior Service each directly raised the very question at issue here, whether they might actually be precluded from seeking contribution under Section 113 because they had undertaken cleanup voluntarily or pursuant to a unilateral EPA administrative order. See Pinal Creek, 118 F.3d at 1305; Centerior Service, 153 F.3d at 351. The Pinal Creek court concluded that parties undertaking voluntary cleanup were permitted to seek contribution under Section 113, as the United States had argued in its *amicus* brief and would repeat again in opposing certiorari. See Pinal Creek, 118 F.3d at 1304-05 (echoing United States' Ninth Circuit Pinal Creek Brief at 12, *supra*). In Centerior Service, the United States flatly rejected the plaintiff's suggestion that it could not bring a CERCLA contribution claim except "during or following a civil action" under Sections 106 or 107. See Centerior Service Brief at 28. As the United States saw it then, "[t]he plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under CERCLA." Id. (emphasis in original). The United States further argued that such a restrictive construction of Section 113 was particularly untenable in light of the provision that nothing therein "shall diminish the right of any person to bring an action for contribution in the absence of a civil action under" Sections 106 or 107. Id. at 28-29 (emphasis in original). Accordingly, the court of appeals in Centerior Service ruled that a Section 106 administrative order was sufficient to trigger contribution rights under CERCLA,

stating that it was "disingenuous at best for the plaintiffs, who have not challenged their status as PRPs, to claim their action is not one for contribution simply because the EPA was not forced to take them to court." Centerior Serv., 153 F.3d at 352.[8]

The plaintiff's argument in Centerior Service may have rightly seemed disingenuous at the time, when the United States was clearly and unequivocally arguing that the plain language of the statute allowed a CERCLA contribution claim for parties who engaged in cleanup without being sued. Yet today, the United States takes precisely the opposite position, arguing (at p. 22-23, n.11) that a liable party must wait for EPA to take them to court before contribution is available under CERCLA.

However, the plaintiffs in Pinal Creek and Centerior Service prophetically foresaw the nightmare scenario that might face the willing party who was deemed too culpable to bring a claim under Section 107, which by its plain language is available to any person, but not culpable enough, because it had not forced litigation, to seek contribution under Section 113. The United States directly argued that this scenario would not come to pass because voluntary and administratively compelled cleanup expenditures could be recovered in CERCLA contribution suits, and the courts of appeals accepted this argument when interpreting the statute. Now the United States has reversed its position, and not only does that reversal reflect bad policy that contradicts CERCLA's express language and widely recognized goals, but it upsets the expectations of private parties and federal courts that relied on the previous representations of the

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[8] Although the United States' position on the issue was clear in its brief, the Centerior Service court expressly reserved judgment on the question addressed in Pinal Creek, whether a party undertaking cleanup without any government compulsion whatsoever was entitled to seek contribution under CERCLA. See Centerior Service, 153 F.3d at 351, n.10.

United States when interpreting the statute. Given this recent change in position, the United States' latest interpretation of the statute should not be given any special deference. See Watt v. Alaska, 451 U.S. 259, 272-73 (1981). In fact, deference should be given to the initial position of the United States, which parties and courts relied on for many years as an authoritative interpretation of the statute.[9]

E. Resolution of Sections 107 and 113

The counter-textual result that this collective interpretation of Sections 107 and 113 would compel, entirely denying recovery under CERCLA to an entire class of private parties, can be resolved in one of two ways. The simplest way is to reject Petitioner's construction of Section 113(f) and conclude, as the United States argued in Centerior Service and the full court of appeals concluded here, that the first sentence of Section 113(f) has no limiting effect because it does not say that a party may only bring a contribution claim "during or following" another civil action under CERCLA. This provision simply clarifies that a contribution

[9] The Pinal Creek and Centerior Service briefs are but two examples of the long line of cases in which the United States has argued the exact opposite of what it is arguing here. For example, in the Axel Johnson case, the United States asserted in its brief to the court of appeals that "[w]hen PRPs conduct the cleanup of a site, they may seek to recover some portion of their necessary costs of response form other PRPs. See 42 U.S.C. 9607(a)(4)(B); 9613(f)(1) (providing right of contribution.)" Brief of United States as *Amicus Curiae* Urging Partial Reversal in Axel Johnson at 3 (6th Cir. 1999) ("Axel Johnson Brief"). This stands in sharp contrast to the statement made by the United States in its brief here (at p. 26) that "CERCLA does not create a federal cause of action under which responsible parties may sue each other at any time for costs they have incurred in cleaning up hazardous substances."
The United States acknowledges in its brief (at p. 26) that it may have "nurtured" the assumption that it in essence agreed with Respondent with "errant language" that is at odds with its position here. But these prior inconsistencies in briefs filed in multiple courts of appeals and in this Court are not "errant language." The reality, as demonstrated here, is that the United States is reversing its position, but continues to cite to precedents obtained based in part on its previous use of "errant language."

claim can be brought during a Section 106 or 107 action, and need not wait for the conclusion of the government suit.

The final sentence of Section 113(f)(1) further reinforces this conclusion by providing that nothing in the subsection should be read to preclude "an action for contribution in the absence of" a claim under Sections 106 or 107. 42 U.S.C. § 9613(f)(1). This language differs markedly from savings clauses found in other statutes, that preserve remedies under other laws, in that it does not refer specifically to any other laws and it explicitly refers to the availability of "an action for contribution" without a prior claim under Section 106 or 107.[10] See also, In re Reading Co., 115 F.3d 1111, 1120 (3d Cir. 1997) ("113(f)(1) specifically permits an action for contribution to be brought 'in the absence of a civil action under…section [107]"). Again, the United States recognized this premise in its Centerior Service Brief.

With this provision viewed in its proper context, it is clear that Congress intended Section 113(f)(1) to preserve the clear right to recovery of cleanup costs expended by any private party, which this Court recognized in Key Tronic. What are being "saved" are not only state causes of action, but also the rights created under Section 107 itself. This interpretation of the statute is entirely consistent with the statutory language and purpose, and it is also fully consistent with this Court's decision in Key Tronic, which held that Sections 107 and 113 created overlapping remedies that must be read together. See Key Tronic, 511 U.S. at 816. This interpretation would also avoid the numerous adverse policy implications discussed above, which Congress plainly could not have intended.

However, if the Court concludes that Petitioner's interpretation of the "during or following" language is

[10] For example, a savings provision in the citizen suit section of the Clean Air Act provides that "[n]othing in Section 304 shall restrict any right which any person …may have under any statute or common law…to seek any other relief…" 42 U.S.C. § 7604(e).

correct, it should clarify that a potentially liable private party who has been subject to a state or federal administrative cleanup order or undertaken cleanup voluntarily, but has not been sued under Section 106 or 107 of CERCLA, can recover costs from other liable parties under the "any other person" language of Section 107.[11] This construction would preserve the plain intent of Congress to provide a cause of action for any person that incurs cleanup costs, and it would also resolve confusion among the courts of appeals as to which parties are entitled to bring claims under Section 107. See Morrison Enter. v. McShares, Inc., 302 F.3d at 1134-35 (noting disagreement in courts of appeals).

F. Distinction from Common Law Contribution

The United States contends (at p. 18) that allowing contribution here would be problematic because Section 113 is premised on the common law right of contribution, and under common law, to bring a contribution claim, a party would have to extinguish the liability of the contribution defendant to the primary plaintiff. The United States is wrong. That may have been the prevailing common law rule, but it is certainly not the rule that underlies CERCLA.

Section 113(f)(3) of CERCLA, 42 U.S.C. § 9613(f)(3), explicitly provides that a liable party can be sued in contribution even if its liability to the government has not been extinguished. When a party settles with the government for some, but not all, of the government's

[11] Alternatively, the Court could determine, as the Ninth Circuit recently did, that the action seeking contribution can itself be viewed as an action under Section 107, and therefore it falls within the contours of the first sentence of Section 113(f)(1). See W. Props. Serv. Corp. v. Shell Oil Co., 358 F. 3d 678, 685 (9th Cir. 2004). Although this seems a less direct way to reach the same result, it is consistent with the United States' argument to the court of appeals in the Axel Johnson case, where the United States stated that "[t]echnically, all CERCLA actions for cost recovery are brought under section 107, which provides the elements of a claim for cost recovery and lists the liable parties and the defenses to liability. Section 113(f)(1) supplements section 107...." Axel Johnson Brief at p. 7, n.6.

response costs, the government may seek the remainder of its costs from non-settlors and the settlors may seek contribution from the non-settlors. Both claims may proceed simultaneously, with the sole proviso being that the government's claims have priority in payment. In other words, a party that unequivocally has not discharged another party's liability—the other party is still being sued by the government—continues to have a contribution claim under CERCLA.

That CERCLA deviates from earlier common law rules is not surprising. That is precisely what the United States had argued for prior to SARA's enactment. This can be seen by comparing the United States' position here to its position in 1985.

Present position: The United States now cites approvingly (at p. 18) to the Restatement of Torts: "As the Third Restatement of Torts explains, the right to contribution depends on the resolution of the underlying liability: 'A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of the liability, either by settlement with the plaintiff by satisfaction of judgment.'" The United States also cites approvingly (at p. 18, n.8) to Section 1(b) of the Uniform Contribution Among Tortfeasors Act ("UCTA").

Position in 1985: On February 5, 1985, EPA published in the Federal Register its Interim CERCLA Settlement Policy. See 50 Fed. Reg. 5034 (Feb. 5, 1985). This policy was issued jointly with the Department of Justice, and makes clear that a settlement with EPA will only release the liability of the settling party. Because that could preclude the settling party from having a contribution claim under common law rules, the policy opposed adoption of such rules or application of Section 1 of the UCTA, the very provision the United States now cites approvingly: "We do not support adopting section 1 of the Uniform Act as a Federal rule of decision. Section

1 would preclude settlors from seeking contribution from non-settlors unless the settlors financed or performed 100 percent cleanup at a site." Id. at 5043.

As the language of SARA makes clear, Congress followed the government's 1985 position. What this demonstrates is that CERCLA contribution rights are not premised on the narrow rules that existed under common law, but instead were intended to displace rigid common law contribution rights. The right of contribution created under CERCLA is broad and robust, precisely to encourage parties to undertake cleanup and pay governmental costs, with the promise that they in turn can sue other liable parties to recoup some of their expense.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,
PETITIONER,
v.
AVIALL SERVICES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF CONOCOPHILLIPS CO., E. I. DU PONT DE NEMOURS AND COMPANY, INC., FORD MOTOR CO., GENERAL DYNAMICS CORP., GENERAL MOTORS CORP., AND MONTROSE CHEMICAL CORP. OF CALIFORNIA IN SUPPORT OF RESPONDENT AVIALL SERVICES, INC.

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QUESTION PRESENTED

Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, may nonetheless bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs it has incurred voluntarily or under government compulsion to clean up properties contaminated by hazardous substances.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae ConocoPhillips Co. ("ConocoPhillips"), E. I. du Pont de Nemours and Company, Inc. ("DuPont"), Ford Motor Co. ("Ford"), General Dynamics Corp. ("General Dynamics"), General Motors Corp. ("General Motors"), and Montrose Chemical Corp. of California ("Montrose") (collectively, the "Companies"), by the nature of their industries, are involved on an on-going basis with issues related to the cleanup of hazardous substances at sites throughout the United States.[1] ConocoPhillips is one of the nation's largest integrated petrochemical companies; DuPont is among the largest chemical products manufacturers; Ford and General Motors are two of the world's leading automobile producers; General Dynamics is a leader in aerospace and defense technologies; Montrose was the world's largest producer of the pesticide DDT. The Companies include some of the largest corporate entities in the world, and contribute significantly to the national and global economy, with annual revenues of over $445 billion and a combined workforce of over 885,000 people.

The Companies have been and continue to be involved in hundreds of environmental cleanups at their facilities and other sites, including sites for which they have been identified as potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et. seq.* As a result, they have vast experience dealing with the remediation of hazardous substances and the recovery of remediation costs, under CERCLA and other related statutes.

The Companies have engaged in more than 170 cleanups

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[1] No party or its counsel authored this brief in whole or in part. Other than the *amici curiae*, no other person or entity made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have given consent to file this brief, and copies of their consent letters have been submitted concurrently.

without the compulsion of a civil lawsuit under CERCLA. They have done so voluntarily, pursuant to United States Environmental Protection Agency ("EPA") orders, as required conditions of operational permits under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and as required by state regulatory authorities. The Companies have performed many such cleanups even though other parties were partially or wholly responsible for the contamination, and therefore liable for some or all of the cost of cleanup. They have been willing to do that because for two decades settled law has ensured that other PRPs eventually would pay their fair share through the CERCLA contribution mechanism.

The ability to obtain equitable contribution from other responsible parties is what has for decades enabled the Companies and others nationwide to undertake voluntary and cooperative responses to releases of hazardous substances without first engaging in expensive, protracted, unnecessary litigation or administrative processes. Petitioner and its *amicus* the United States now seek to restrict contribution to parties forced to perform cleanups by federal lawsuits and eliminate contribution for anyone who performs cleanups voluntarily or pursuant to other forms of governmental coercion. Such a curtailment of the contribution right will create an enormous disincentive to future voluntary or agency-compelled remediation, and inequitably saddle parties only partly responsible for contamination with the full costs of cleanup, while permitting other parties responsible for the contamination (like the United States) to avoid paying their fair share.

For these reasons, the Companies have a critical interest in the outcome of this case, and their informed views should assist the Court in resolving this important issue of law.

STATEMENT OF THIS CASE

Amici curiae concur with and adopt the statement of the case proffered by Respondent.

SUMMARY OF ARGUMENT

For more than two decades, PRPs have cleaned up hazardous pollutants at facilities nationwide without the necessity of a federal lawsuit or court order, consistent with the fundamental purposes of CERCLA and secure in their ability under the statute to obtain federal common law contribution from other responsible parties. Petitioner and the United States seek a radical change in that law. In their view, the plain language of Section 113(f)(1) of CERCLA allows contribution only during or after a civil action under Section 106 or Section 107 of CERCLA. That is, of course, not what the text actually says. Nor is it a permissible reading of that text in the context of the statute as a whole. Interpreting Section 113(f)(1) to forbid contribution for any person or company that has performed a cleanup voluntarily or pursuant to another EPA or state program is flatly inconsistent with Congress's desire to ensure the prompt cleanup of hazardous substances and impose the costs on those responsible for the contamination. It is also flatly inconsistent with Congress's desire in CERCLA to treat the United States, when the United States is a PRP, the same as any other PRP. Foreclosing contribution in the absence of a civil action under Section 106 or Section 107 would allow the federal government—by picking and choosing among enforcement priorities based on whether the United States is or is not a PRP at a particular site, or forcing cleanups by other means—to avoid altogether its responsibility to remediate contamination caused by government action. Congress could not and did not intend for the law to function in that way.

A. The contribution provision in CERCLA Section 113(f)(1) does not preclude a PRP that has incurred costs to clean up contaminated property from seeking contribution in the absence of a civil action under Section 106 or Section 107. Contrary to Petitioner's and the United States's arguments, which require adding words that do not actually appear in the text, the first sentence of Section 113(f)(1) may

be read to authorize an action for contribution during or following a civil action under Section 106 or 107, without precluding contribution claims in the absence of such an action; and Section 113(f)(1)'s final sentence is most naturally read to preserve *all* other available avenues for contribution, under federal common law as well as state law.

B. This interpretation is far more consistent with the purposes of Section 113(f)(1) than is Petitioner's revisionist view of the law. Before the 1986 amendments added that provision, courts allowed CERCLA contribution claims to proceed regardless of the existence or absence of a proceeding under Section 106 or 107. Nothing in the legislative record suggests that Congress intended to foreclose that remedy. To the contrary, the legislative history makes clear Congress's expectation that the courts would continue to apply federal common law contribution broadly, as a necessary concomitant to the application of common law-based principles of joint and several liability in civil actions and administrative orders under CERCLA Sections 106 and 107.

C. Petitioner's understanding of Section 113 is also flatly inconsistent with Congress's fundamental intention through CERCLA to encourage the prompt cleanup of hazardous substances. The availability of contribution for remediation not compelled by civil litigation has fostered a willingness on the part of parties such as the Companies to spend billions of dollars to clean up contamination without resort to costly and time-consuming litigation or the formal procedures of CERCLA. Congress and EPA have consistently recognized that this voluntary or agency-ordered compliance is crucial to achieving CERCLA's goal of prompt cleanup. If this Court were to adopt Petitioner's interpretation of the law to preclude contribution in these circumstances, no company with a colorable claim for contribution against other PRPs would ever undertake a cleanup until forced to do so by court order.

It is perverse that the United States would support Petitioner's contention that CERCLA contribution should be so narrowly circumscribed, in view of the government's responsibility under the statute for promoting and enforcing hazardous waste site remediation. If Petitioner's position were adopted, incentives to undertake cleanups voluntarily or in response to agency orders would drastically decrease. Existing remediation would grind to a halt as companies demand the government bring their cleanups within the few CERCLA provisions that Petitioner argues would give rise to a right of contribution, overwhelming the government's limited resources.

Petitioner and the United States maintain that companies could nevertheless protect their rights to contribution by first settling with the federal or a state government. But that retort rings hollow, both because agencies with limited regulatory budgets will not have the resources to attend promptly to all sites requiring remediation and because state and federal governments are unlikely to agree to settlements that would trigger their own contribution liabilities on sites where they are PRPs. The result will be a massive slowdown in cleanup activity, with additional legal costs burdening remediation efforts—hardly what Congress had in mind.

D. The curtailment of contribution outside of a Section 106 or Section 107 civil action is also flatly inconsistent with Congress's goal through CERCLA to require the parties responsible for contamination to pay the costs of remediation. If Petitioner's position were adopted, those who voluntarily remediated contamination in the past would be saddled with one hundred percent of the costs, regardless of their level of responsibility for the harm, and many companies forced to remediate sites through mechanisms other than Section 106 or 107 civil actions—e.g., through Section 106 administrative orders or as conditions to a RCRA permit—would equally be deprived of any

opportunity to seek equitable contribution. It is highly doubtful that Congress intended this result either.

E. By supporting Petitioner's view of Section 113, the federal government is seeking to undermine Congress's intent—reflected in CERCLA's broad waiver of sovereign immunity—that the United States, as a PRP, be treated like any private party which caused contamination. Petitioner's position, if adopted, would permit the federal government to avoid paying its fair share of the costs of remediation by picking and choosing which sites to clean up under CERCLA (avoiding sites where it is a PRP), enforcing cleanups under other federal programs that, it now argues, do not give rise to contribution rights, or conditioning settlements on covenants by PRPs not to sue the United States for contribution (a strategy it is already pursuing). Adoption of this position would, accordingly, enable the federal government to protect its narrow fiscal interests as a PRP at hundreds of contaminated sites.

It is deeply troubling that the United States would adopt an interpretation of Section 113(f)(1) that would so fundamentally undercut Congress's purposes in enacting the sovereign immunity waiver and so dramatically retard Congress's efforts to achieve prompt remediation and equitable sharing of the costs among those responsible for contamination. This Court should reject the government's invitation to sanction that result.

ARGUMENT

I. THE TEXT OF CERCLA SECTION 113(f)(1) DOES NOT PRECLUDE A PARTY THAT HAS INCURRED RESPONSE COSTS FROM BRINGING A CONTRIBUTION ACTION UNDER CERCLA SECTION 113(f)(1) IN THE ABSENCE OF A CIVIL ACTION UNDER SECTIONS 106 OR 107

Petitioner and the United States insist that the language of CERCLA Section 113(f)(1) has a plain meaning which

permits contribution only during or after a civil action under CERCLA Sections 106 or 107. *See* Pet Br. at 5, 13-21; U.S. Br. at 10-17. But the text of Section 113(f)(1) does not lend itself to that (or any other) "plain meaning" interpretation. The Fifth Circuit was correct in finding the text inconclusive, and thus correctly interpreted that text with reference to CERCLA's underlying, remedial purposes.

Petitioner and the United States argue that, as a matter of basic English, the first sentence of Section 113(f)(1) says that contribution may be sought *only* during or following any civil action under Section 106 or under Section 107, and that its final sentence provides that the subsection shall not diminish the right of any person to bring a *state law* action for contribution. *See* Pet Br. at 6, 13-19; U.S. Br. at 10, 12-15. However, neither italicized term actually appears in the statute. Both the first and the last sentences of Section 113(f)(1) can be read intelligibly, as a matter of basic English, without the terms Petitioner inserts.

Indeed, Petitioner ultimately acknowledges that the pivotal term "may"—used in the first sentence of Section 113(f)(1) to authorize contribution during or following a Section 106 or 107 action—can be read linguistically to be either permissive (and thus allow contribution in other circumstances as well) or exclusive. *See* Pet. Br. at 14 n.8. Petitioner then argues that the canon *expressio unius est exclusio alterius* requires the exclusive connotation (Pet. Br. at 15), but that canon of construction is not as categorical as Petitioner suggests. To the contrary, it is "only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 535 U.S. 55, 65 (2002). In CERCLA Section 113(f)(1), the contrary indication is express in the final sentence's preservation of actions for contribution in the absence of the so-called "condition precedent," and it is also evident from the purpose and context of the statute as a whole. *See Herman & MacLean v. Huddleston*, 459 U.S.

375, 387 n.23 (1983) (rejecting maxim when applying it would interfere with a statutory construction more in conformity with an act's "'dominating general purpose'") (citation omitted).

Petitioner seeks to bolster the exclusivity it reads into the first sentence by reading the final sentence to save only contribution actions under state law. But the word "state" never appears in that sentence, and if it were read to refer only to preserve state contribution law, it would be superfluous, because CERCLA's general "Savings" clause, Section 302(d), already provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Moreover, had Congress desired to restrict its reference to "contribution" in the last sentence of Section 113(f)(1) to "state" contribution actions, it could easily have done so. *See, e.g.*, Oil Pollution Act, 33 U.S.C. § 2718(a) ("[n]othing in this chapter ... shall (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—(A) the discharge of oil or other pollution by oil within such State"); Health Care Quality Improvement Act, 42 U.S.C. § 11115(a) ("nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter").

Reading the final sentence of CERCLA Section 113(f)(1) to preserve both state law contribution remedies and the federal common law contribution right previously recognized and enforced by courts irrespective of the existence of a civil action under Section 106 or 107—*see* discussion *infra* at 10-12—would also comport with the

"normal rule of statutory construction ... that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

Petitioner's suggestion that the final sentence of Section 113(f)(1) should be read to preserve only *state law* contribution is not only inconsistent with the plain text and these standard canons of construction, but it is also utterly counter-historical and inconsistent with Congress's desire for a comprehensive federal solution to the problems posed by hazardous waste. When Congress adopted Section 113 in the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 ("SARA"), there were few, if any, state hazardous substance laws that provided a right of contribution. For example, the contribution provisions of the Texas statutes which Petitioner asserts were among those "saved" by the last sentence of Section 113(f)(1) were not enacted until 1989. *See* Act of Sept. 1, 1989, 71st Leg., Reg. Sess., ch. 678, § 361.344, 1989 Tex. Sess. Law Serv. 678 (codified as amended at Tex. Health & Safety Code Ann. § 361.344(a)); Act of May 31, 1989, 71st Legis., Reg. Sess., ch. 228, § 26.3513, 1989 Tex. Sess. Law Serv. 228 (codified as amended at Tex. Water Code Ann. § 26.3513). The New Jersey Spill Compensation and Control Act, which was enacted in 1976 and served as a model for CERCLA, was not amended to add a contribution provision until 1991. *See* 1991 N.J. Sess. Law Serv. 372, § 1 (West 1991) (codified as amended at N.J. Stat. Ann. 58:10-23.11f(a)(2)).

Moreover, the statutory and common laws of contribution vary so widely from state to state in their scope and procedural requirements[2] that interpreting the last sentence of Section 113(f)(1) to refer only to state

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[2] *See* discussion in Respondent's Brief regarding state contribution laws. Resp. Br. at 27.

contribution law would seriously undermine Congress's goal of providing a uniform, federal rule of law regarding the cleanup of hazardous substances. *See* 126 Cong. Rec. H11,787 (daily ed. Dec. 3, 1980) (a goal of CERCLA was to "insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in states with more lenient laws"). In light of that statutory goal, it is highly unlikely that Congress would have relied on state law contribution claims as the exclusive vehicle for bringing contribution claims absent a civil action under Section 106 and 107.[3]

II. PETITIONER'S INTERPRETATION OF CERCLA SECTION 113(f)(1) IS INCONSISTENT WITH CONGRESS'S INTENT THROUGH THAT SECTION TO CONFIRM THEN-EXISTING RIGHTS TO CONTRIBUTION AND ALLOW CONTINUED DEVELOPMENT OF THE FEDERAL COMMON LAW OF CONTRIBUTION UNDER CERCLA

Because the term "contribution" was added to CERCLA by the SARA amendments in 1986, any interpretation of that term and the section in which it appears must begin by considering how SARA was intended to affect CERCLA. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). When Congress added Section 113 in SARA, it was not legislating in a vacuum. Absent an express contribution

[3] Congress's desire for uniformity does not necessarily mean that state law contribution actions are preempted by Section 113. Pursuant to Section 302(d), where state contribution laws do not actually conflict with CERCLA, they should continue to be available. Instead, the overriding purpose of providing a uniform, federal solution to the pressing problem of hazardous waste disposal, combined with the lack of uniformity among statutory contribution provisions and case law at the state level, makes it highly unlikely that Congress was contemplating "state law contribution" when it crafted the last sentence of Section 113(f)(1).

provision, courts in the preceding five years had fashioned a federal common law contribution right among parties that were jointly liable for response costs under Section 107, regardless of whether there had been a civil action under Section 106 or Section 107. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982); *see also* Pet. App. 15a-16a & n.7 (discussing pre-SARA cases permitting private right of cost recovery in the nature of contribution without prior state or federal enforcement action or settlement). When Congress enacted Section 113, it fully endorsed those efforts. *See* H.R. Rep. No. 99-253 (I), at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861; S. Rep. No. 99-11, at 44 (1985). Congress's purpose in enacting this provision, in fact, was to "clarif[y] and confirm[]" the right of contribution the federal courts had developed. H.R. Rep. No. 99-253 (I), at 59, 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2841, 2861.[4] There is no evidence to suggest that, by enacting

[4] Before the SARA amendments, courts interpreting CERCLA implied a right of contribution from the liability provisions of Section 107(a). *See, e.g., Walls v. Waste Resource Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982); *see also* Pet. App. 18a-19a. This Court has noted that, even after Congress enacted SARA, CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." *See Key Tronic*, 511 U.S. at 816; *see also id.* at 822 & n.* (Scalia, J., dissenting) (arguing that the right of action created by Section 107 is express, rather than implied). Other courts since have recognized this derivation of the federal common law right of contribution from the federal common law-based joint and several liability for response costs imputed to Section 107(a). Those courts have appreciated that, in the absence of a suit under Section 106 or 107, Sections 107 and 113 "work together—the first section creating the claim for contribution between PRPs, and the second qualifying the nature of that claim." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997); *see also* Pet. App. 22a-23a (discussing interrelationship of Sections 107 and 113); *Centerior Serv.*

Section 113(f)(1), Congress intended to cut back the contribution rights federal courts had recognized under CERCLA.

Indeed, CERCLA's legislative history demonstrates the contrary—that lawmakers desired the courts to develop the scope of CERCLA contribution consistent with evolving principles of federal common law. *See, e.g.*, 126 Cong. Rec. 30,932 (1980) ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law.") (statement of Sen. Randolph); 126 Cong. Rec. 31,965 (1980) ("[T]his bill refers to section 311 of the Clean Water Act and to traditional and evolving principles of common law in determining the liability of such joint tortfeasors. ... the bill will encourage the further development of a Federal common law in this area.") (statement of Rep. Florio). SARA was not intended to change that. Instead, the congressional reports for SARA provided expressly that even after its enactment, "[a]s with joint and several liability, contribution claims will be resolved pursuant to Federal common law." S. Rep. No. 99-11, at 45 (1985); H.R. Rep. No. 99-253(I), at 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2862; *id.* (III), at 18-19,

Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 352 (6th Cir. 1998) (allowing a party to proceed with a CERCLA contribution claim after incurring costs under a Section 106 order); *Sun Co. v. Browning-Ferris Indus., Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) (stating that "[u]nder CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107, but is governed by the equitable apportionment principles established in § 113(f)" in a claim for cost recovery by a party that had received a Section 106 order). Although a consensus has developed among the Courts of Appeals that a PRP may not bring an action directly under Section 107(a) to hold other PRPs jointly and severally liable for its response costs, *see* Pet. Br. at 35 n.29, a settled federal common law has developed, consistent with Congress's intent under SARA, which allows a PRP an implied right of contribution, derived from Section 107 and regulated by Section 113.

reprinted in 1986 U.S.C.C.A.N. 3038, 3041.[5] Consistent with that intent, ten Courts of Appeals have authorized contribution claims in the absence of a prior civil action under Section 106 or 107 since 1986. *See Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669 (3d Cir. 2003); *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 688-89 (5th Cir. 2002) (en banc); *Morrison Enters. v. McShares Inc.*, 302 F.3d 1127 (10th Cir. 2002); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001); *Crofton Ventures Ltd. P'ship. v. G&H P'ship*, 258 F.3d 292, 300 (4th Cir. 2001); *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998); *Pinal Creek Group. v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 932-933, 935 (8th Cir. 1995); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1147 (1st Cir. 1989).

In no reported judicial opinion or agency pronouncement has EPA or any other agency of the United States ever before questioned the common law underpinnings of implied contribution rights under CERCLA. This is both unsurprising and appropriate, since EPA has consistently relied upon the very same traditional and evolving principles of federal common law to support its assertion that Section 107 imposes joint and several liability on PRPs. Courts recognized early on that CERCLA's general language must be interpreted in light of general common

[5] Congress's intent that evolving principles of federal common law have a place in defining contribution under CERCLA distinguish this case from *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 603 (1981), in which the Court declined to imply contribution rights under federal civil rights and antitrust statutes. The history of the statutes at issue in those cases gave no indication that Congress intended to authorize courts to create a federal common law of contribution. *See Northwest Airlines*, 451 U.S. at 94; *Tex. Indus.*, 451 U.S. at 644.

law principles. *See, e.g., United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio. 1983). Applying those principles (and at EPA's urging), the courts nearly universally concluded that that liability under CERCLA is joint and several. *See, e.g., Mardan Corp. v. C. G. C. Music Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986); *Chem-Dyne*, 572 F. Supp. at 809-10. In enacting Section 113 Congress acknowledged that the courts had counterbalanced the harshness of that joint and several liability by recognizing a "concomitant right of contribution" that sprang from the very same common law roots. H.R. Rep. No. 99-253 (I) at 79, *reprinted in* 1986 U.S.C.C.A.N. at 2861; *see also United States v. Kramer*, 757 F. Supp. 397, 436 (D.N.J. 1991) (noting that "Congress conferred the right to seek contribution from other PRPs in recognition of the impact joint and several liability could have upon PRPs selected by the Government and found liable for recovery. ... The right to seek reimbursement from other PRPs of response costs paid spreads liability more equitably among all PRPs.") (citations omitted).

Pursuant to these same common law principles, EPA routinely takes the position that a unilateral administrative order under Section 106 imposes joint and several liability on the target of the order, requiring it to clean up the entire contaminated site, even if the target is responsible for only a tiny portion of the contamination. Acceptance of Petitioner's and the United States's position in this case—that the courts should continue to enforce such joint and several liability, but without permitting the target its corresponding right to contribution—would destroy the symmetry of the common law and thereby defeat Congress's intent that the parties actually responsible for contamination bear the cost of cleanup. Given its continued reliance on federal common law-based joint and several liability under Section 106 or 107, without which contribution rights would be unnecessary, the United States

has little standing to rail, selectively, against the continued recognition of federal common law contribution.[6]

Petitioner's and the United States's insistence that the first sentence of Section 113(f)(1) proves a contrary congressional intent to eliminate preexisting federal common law contribution rights (despite the continued application of common law joint and several liability) in the absence of a civil action under Section 106 or 107, is belied by the legislative history of that provision. The bill originally proposed by the EPA and the Natural Resources Division of the Department of Justice ("DOJ") provided that contribution actions could be brought only after judgment or settlement of an action under CERCLA. *See* H.R. Res. 1342, 99th Cong., § 202, 131 Cong. Rec. H944 (daily ed. Feb. 28, 1985). The House of Representatives rejected this proposal and adopted H.R. 2817, which altered the initial proposal to make clear that a contribution action could proceed "during or following" an action under Section 106 or 107. The House Report noted that "[t]he section contemplates that if an action under section 106 or 107(a) of the Act is ***under way***, any related claims for contribution ... may be brought in such an action." H.R. Rep. No. 99-253 (I), at 80, *reprinted in* 1986 U.S.C.C.A.N. at 2862 (emphasis added); *see also* Resp. Br. at 22. Thus, viewed in context, the "during or following" language in the first sentence of Section 113(f)(1) was merely a surgical fix added to denote Congress's rejection of a proposal that would have required parties sued under Section 106 or Section 107 to stay their contribution claims until the proceeding was completed.

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[6] The United States's strident insistence that Congress's express provision for contribution in some circumstance precludes the continued recognition of federal common law contribution rights in others is hard to reconcile with the United States's equally adamant support for joint and several liability under Sections 106 and 107, notwithstanding the Senate's elimination of the express provision for joint and several liability from the final bill when CERCLA was initially enacted. *See* S. 1480, 96th Cong., 2d Sess., § 4(a), 126 Cong. Rec. 30,906, 30,908, 31,950, 31,955 (1980).

This clarification was included to prevent a narrowing construction of contribution rights, not to impose one.

III. PETITIONER'S INTERPRETATION OF CERCLA SECTION 113(f)(1) IS INCONSISTENT WITH CERCLA'S FUNDAMENTAL PURPOSES OF ENCOURAGING THE PROMPT CLEANUP OF HAZARDOUS WASTE AND ENSURING THE EQUITABLE ALLOCATION OF COSTS AMONG PARTIES RESPONSIBLE FOR CONTAMINATION

Congress enacted CERCLA in 1980 to provide a comprehensive federal remedy to the serious risks that industrial pollution posed to human health and the environment. The statute has two fundamental purposes: to encourage the prompt cleanup of hazardous waste disposal sites and to ensure that the parties responsible for the contamination pay the costs of remediation. *See* 126 Cong. Rec. 31,964 (1980) (statement of Rep. Florio); H.R. Rep. No. 99-253 (III), at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 3038. Petitioner's interpretation of Section 113(f)(1) would undermine both purposes.

A. PETITIONER'S CONSTRUCTION OF SECTION 113(f)(1) IS INCONSISTENT WITH CONGRESS'S DESIRE TO ENCOURAGE THE PROMPT CLEANUP OF HAZARDOUS WASTE

"'CERCLA was enacted to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites.'" *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (citation omitted). Congress recognized that the government lacked the resources to perform the necessary cleanups on its own, and therefore "sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially

responsible parties." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion of Brennan, J.), *overruled on other grounds by Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *see also Key Tronic*, 511 U.S. at 819 & n. 13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others"); *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 652 (6th Cir. 2000) ("CERCLA is a statute designed to 'facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible....'" (citation omitted)). An interpretation of Section 113 that permits parties liable for contamination to seek contribution from other PRPs at the same facility, without waiting for a Section 106 or Section 107 civil action, is critical to incenting such cleanups.[7]

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[7] The Court has repeatedly taught that a remedial statute such as CERCLA must "be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."'" *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (citations omitted)) (Securities Exchange Act of 1934). If there is no definitive way of determining congressional intent, "'when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals.'" *California v. Am. Stores Co.*, 495 U.S. 271, 279 n.4 (1990) (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985)) (endorsing First Circuit's interpretation of Section 16 of the Clayton Act). The Courts of Appeals have applied this principle frequently when interpreting CERCLA. *See, e.g., Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880-81 (9th Cir. 2001); *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (citing as one of CERCLA's "few well-established principles" that "'[b]ecause it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals'") (citation omitted); *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 416 (4th Cir. 1999) ("Because CERCLA is 'a comprehensive remedial statutory scheme, ... courts must construe its provisions liberally to avoid frustrating the legislature's purpose.'") (citation omitted) (alteration in original); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d

Facilitating cleanups by PRPs responding to agency orders and "volunteers"—parties under threat of, but not defendants in, civil litigation—is critical to CERCLA's overall goal of promoting fast, efficient and equitable cleanups. *See Pinal Creek Group*, 118 F.3d at 1304. Despite Petitioner's failure to "discern any policy" at CERCLA's enactment favoring such "voluntarism," Pet. Br. at 36 & n.31, that policy has been crystal clear since Congress first enacted CERCLA. *See* H.R. Rep. No. 96-1016(I), at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 ("The legislation would also establish a federal cause of action ... to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites."); 126 Cong. Rec. 26,338 (1980) (remarks by Rep. Florio that CERCLA's liability scheme "creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties").

When Congress promulgated the contribution provisions in Section 113 in 1986, it was certainly aware that EPA considered voluntary cleanups essential to effective enforcement of the statute. *See* Pet. Br. at 36 n.31 (citing EPA Interim CERCLA Settlement Policy (OSWER Dir. No. 9835.0, dated Dec. 5, 1984), *published in* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985) ("The Agency recognizes, however, that Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites.")). And encouraging voluntary cleanups continued thereafter to be a major focus of EPA's approach to the cleanup of hazardous waste: in post-SARA rulemaking to revise the National Contingency Plan ("NCP"), EPA acknowledged that "it is important to encourage private parties to perform voluntary cleanups of

Cir. 1992) ("CERCLA is a remedial statute which should be construed liberally to effectuate its goals.").

sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." EPA, Final Rule, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8792 (Mar. 8, 1990).

In this regard, the statute has been a major success. Companies nationwide routinely undertake cleanups, as Aviall did in this case, without the necessity of litigation or formal enforcement action by an agency. EPA has deliberately built on this success by making it a policy to move remediation out from under CERCLA authority and into other federal and state programs. *See, e.g.*, EPA, Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities, at 2 (Sept. 24, 1996 Memorandum) ("EPA RCRA-CERCLA Coordination Memorandum"), *available at* http://www.epa.gov/Compliance/resources/policies/civil/rcra/rcracorraction-mem.pdf (last visited Apr. 4, 2004) ("[I]t has long been EPA's policy to defer facilities that may be eligible for inclusion on the National Priorities List (NPL) to the RCRA program...."). Thus, the vast majority of hazardous waste sites across the nation are now being cleaned up under non-CERCLA authority.[8] PRPs throughout the United States incur significant response costs during cleanups that do not involve Section 106 or 107 civil enforcement or a formal settlement under CERCLA. In the aggregate, these costs are staggering. The potential cost just to remediate RCRA

[8] Compared to 1,240 sites listed on the National Priorities List ("NPL") under CERCLA, there are over 6,500 facilities subject to RCRA corrective action. *See* http://www.epa.gov/superfund/sites/npl/newfin.htm (last visited Mar. 31, 2004); http://www.epa.gov/epaoswer/hazwaste/ca/training/theatre.htm, scene #77 (last visited Mar. 31, 2004). A study for fiscal year 2000 indicated that, all told, cleanups were on-going at over 15,000 non-NPL sites under state cleanup programs, and approximately 7,100 strictly voluntary non-NPL site cleanups were in progress. *See* John Pendergrass, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update*, at 16-17 (2002).

facilities has been estimated to be as high as $377 billion. *See* Leigh Adele Aberbach, Casenote, *Recoverability of Government Oversight Costs Under CERCLA Section 107: United States v. Rohm & Haas Co.*, 6 Vill. Envt'l L.J. 123, 129 n.34 (1995).

The Companies submitting this brief, alone, have engaged in more than 170 such cleanups not involving litigation (or covered settlements) under Section 106 or 107, with past and estimated future response costs in excess of $1.7 billion. At least 50 of these cleanups, with past and estimated future response costs of over $750 million, were performed under the RCRA Corrective Action program which, as discussed *infra* at 26, EPA views as providing "equivalent protection" to CERCLA. *See* EPA RCRA-CERCLA Coordination Memorandum at 4. At many of these sites, other parties (including the United States) are partly responsible for the contamination. Under Petitioner's interpretation of Section 113(f)(1), however, the costs—incurred in response to the release of hazardous substances as defined in CERCLA—would not be recoverable in contribution from those other PRPs.

As several courts have recognized, adopting Petitioner's interpretation of Section 113(f)(1), which forecloses PRP volunteers who fund and perform necessary cleanups in full compliance with the NCP[9] from recovering other PRPs' equitable share of the costs, would provide a powerful disincentive to future voluntary remedial action. *See Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) ("We acknowledge . . . that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available."); *Mardan*, 804 F.2d at 1465 (Reinhardt, J., dissenting) ("Without the ability

[9] Only costs that are necessary and consistent with the NCP are recoverable under CERCLA. *See* 42 U.S.C. § 9607(a)(4)(B).

to require contribution from other responsible parties, the current operator may prefer to wait and let the government do the work."); *E. I. du Pont de Nemours & Co. v. United States*, 297 F. Supp. 2d 740, 754 (D.N.J. 2003) ("*DuPont*") (district court acknowledged that its decision to prohibit a contribution action in the absence of a civil action under Section 106 or 107 "might very well hamper some PRP efforts at removal and remediation of hazardous waste sites").

The United States's more aggressive argument that only a judgment in a "civil action" under Section 106(a) can give rise to a contribution claim (U.S. Br. at 22 n.11) would lead to even more perverse results. According to the United States, a company that receives and complies with a CERCLA Section 106 order and incurs millions of dollars in response costs would have no claim for contribution under CERCLA. Yet, a party seeking to preserve its right of contribution cannot afford to ignore the Section 106 order and invite a Section 106(a) enforcement action. The consequences of refusing to comply are simply too severe: EPA could proceed to conduct the response action on its own, then seek to recover three times the cost of cleanup from the party. *See* 42 U.S.C. § 9607(c)(3). In addition, the non-compliant party could be liable for daily penalties of $32,500 per day over the course of a cleanup that could last for years. *See id.* § 9606(b)(1); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004). And because a party receiving a Section 106 order generally has no right to pre-enforcement review, it would have to sit by helplessly and permit those treble damages and daily penalties to accrue as the cleanup slowly progresses. *See* 42 U.S.C. § 9613(h). Realistically, a PRP that receives a Section 106 order may have no choice but to comply, thereby making a mockery of Congress's intent to provide a right of contribution.

Even if some companies would choose to stand up to EPA, and force the agency to file a lawsuit in order to

ensure their later contribution rights, that is hardly a panacea for those interested in prompt remediation. The government will inevitably lack the resources necessary to initiate Section 106 and 107 actions for every site, and far fewer cleanups will take place. This effect would become more and more pronounced over time, as the size of the Superfund shrinks and less money is set aside for CERCLA enforcement.

EPA officials have publicly acknowledged the significant adverse effect that adoption of Petitioner's position in this case could have on hazardous waste cleanups. Outgoing EPA Region V Superfund Director Bill Muno stated in February 2004 that a restrictive interpretation of Section 113(f)(1) would increase EPA's workload by having companies at sites already under remediation "applying to us for a federal [cleanup] agreement" in order to be able to pursue other parties in contribution. *See "Aviall* May Direct Superfund Enforcement Funds, EPA Official Says," InsideEPA Superfund Report (Feb. 2, 2004). Muno also indicated that a decision reversing the Court of Appeals would require diverting funds from cleanup to enforcement, at a time where Congress has again reduced the budget for the Superfund program in 2004.[10] *See id.* He further acknowledged that EPA had been successful in relying on alternative cleanup programs, saying that EPA was "seeing a lot of cleanup activity still underway outside of the traditional Superfund program." *Id.*

The crabbed view of contribution advanced by Petitioner and the United States would also undermine those cleanups, including the cleanups Congress intended to

[10] A recent analysis by the General Accounting Office ("GAO") found that appropriations for the Superfund program have decreased by $662 million—a 35% decline—since 1998. *See* GAO Letter Report to Senator James Jeffords, GAO-04-475R Superfund Program, Feb. 18, 2004, *available at* http://www.insideepa.com/secure/data_extra/dir_04/epa2004_0352a.pdf (last visited Apr. 4, 2004).

encourage under the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 15 Stat. 2356 (2002) ("Brownfields Act"). CERCLA Section 128, added by the Brownfields Act, provides for grants to states to encourage programs for site assessment and reuse. Where a PRP agrees to conduct a cleanup under such a state program, the United States is *precluded* by Section 128(b)(1) from bringing a civil enforcement action under Section 106 or 107. 42 U.S.C. § 9628(b)(1). If Petitioner's view of the law were adopted, however, that safe harbor would become a trap for the unwary, as any party signing up to conduct a site remediation under a Section 128 program would forfeit its right to obtain contribution under CERCLA for the response costs it incurred.

If the position advanced by Petitioner and the United States were adopted, any parties that might have engaged in cleanups "outside of the traditional Superfund program" would be forced instead to call upon a federal or state agency's limited resources to obtain a "traditional Superfund solution" to preserve their contribution rights—further delaying, rather than expediting, the cleanup of contaminated sites. It is doubtful Congress meant to *impede* the cleanup of contaminated sites in that way. Given Congress's paramount goal to effectuate the prompt cleanup of facilities contaminated with hazardous wastes, it would be perverse to interpret the statute to punish voluntary or cooperative compliance.

Petitioner and the United States protest that their interpretation would not impede such compliance because it would preserve the right of companies to obtain contribution under Section 113(f)(3)(B) so long as they perform the cleanup under the terms of a qualifying settlement with the federal or a state government. But that prospect, for many, would be merely illusory. If every PRP with potential liability for a contaminated site were to engage the federal or a state government in a formal pre-cleanup process to settle their CERCLA liability, it would

quickly overwhelm the limited resources of their enforcement agencies, and dramatically slow the pace of remediation.

The notion that private parties would be permitted to protect their contribution rights by entering into covered settlements is also dubious because Petitioner's and the United States's view of Section 113(f)(1) provides federal and state governments a warped incentive to resist settlement at sites where they are themselves PRPs and therefore potential targets of contribution actions. If the government were immune from having to pay for its contamination at these sites absent a prior civil action under Section 106 or 107, it would have no incentive to enter into a settlement which could allow the settling PRPs to sue the government in contribution. This is not merely a theoretical danger. At some contaminated sites where the Companies are PRPs, the United States is already attempting to condition CERCLA settlements upon PRPs agreeing not to sue the United States in contribution for contamination it caused at or near the sites.[11]

Absent an ability to effect a settlement that includes an allocation of the government's liability for the pollution it caused at the site, PRPs will be able to protect their contribution rights only by foregoing a voluntary cleanup and forcing the United States to bring a civil action under Section 106 or 107. In lieu of a rapid cleanup of a contaminated site, there would be lengthy delays and

[11] The United States has adopted a similar uncompromising negotiating position on matters currently in litigation. For example, General Motors has pending contribution claims against the United States for the government's part in wartime contamination at several General Motors plants. *See Gen. Motors Corp. v. United States*, No. 01-CV-2201 (D.N.J. filed May 7, 2001). After the claims for 14 of the 16 plants were successfully settled through mediation with the government, the United States broke off mediation of the remaining claims in the wake of the district court's decision in *DuPont*.

possibly protracted litigation before any cleanup actually takes place. It is doubtful Congress intended that result.

B. PETITIONER'S CONSTRUCTION OF CERCLA SECTION 113(f)(1) IS INCONSISTENT WITH CONGRESS'S DESIRE TO ENSURE THAT THOSE RESPONSIBLE FOR CONTAMINATION PAY THE COSTS OF REMEDIATION

The Court has recognized that a fundamental purpose of CERCLA is to ensure that "those actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions.'" *United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998) (quoting S. Rep. No. 96-848, at 13 (1980)); *see also Union Gas*, 491 U.S. at 21 ("*[E]veryone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.") (plurality opinion of Brennan, J.) (emphasis in original). Under Petitioner's view, the entire costs would instead by borne by any party that has performed a cleanup in the absence of a Section 106 or 107 action. The inequity of this position is striking, and is perhaps demonstrated most starkly with respect to parties that conduct cleanups under RCRA.

RCRA was enacted in 1977 to reduce the generation of hazardous waste and ensure the proper treatment, handling and disposal of waste that is generated. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). Although RCRA is "not principally designed to effectuate the cleanup of toxic waste sites," *id.*, the practice of the EPA for over 20 years has been to use RCRA for just that purpose. The agency acknowledged this long ago in stating that "[s]ince the first NPL final rule (48 FR 40658, September 8, 1983), the Agency's policy has been to defer placing sites on the NPL that can be addressed by corrective action under Subtitle C of [RCRA]." EPA, Policy Statement, The National Priorities List for Uncontrolled Hazardous Waste

Sites—Criteria for Determining Unwillingness for Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, 53 Fed. Reg. 30,005, 30,005 (Aug. 8, 1988) ("RCRA Policy Statement").

In 1984, Congress amended RCRA to expand EPA's authority under Subtitle C to require cleanup of contamination under RCRA. The amendments implemented a requirement that facilities which treat, store or dispose of hazardous waste must obtain a RCRA permit from EPA or a delegated state agency. One condition of the RCRA permit is that the facility undertake a long-term corrective action program to address contamination. *See* 42 U.S.C. §§ 6924(u), (v), 6928(h). Based on this enhanced RCRA authority, EPA promulgated a policy that deferred handling RCRA sites under CERCLA unless EPA determined that RCRA corrective action was not likely to succeed or occur promptly. *See* RCRA Policy Statement, 53 Fed. Reg. at 30,006.

EPA has thus come to consider RCRA and CERCLA to provide alternative and essentially equivalent means for achieving cleanups of contaminated properties. *See* EPA RCRA-CERCLA Coordination Memorandum at 2 ("Generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs."). The courts in turn have recognized that costs related to actions that qualify as "removal actions" within the meaning of CERCLA are recoverable under CERCLA, notwithstanding a different statutory authority was invoked to achieve the cleanup. *See, e.g., United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1274-75 & n.15 (3d Cir. 1993).[12]

According to Petitioner's reading of Section 113(f)(1), however, a company that incurs costs for a RCRA cleanup

[12] RCRA preserves the right of parties to seek recovery of its cleanup costs under other federal and state laws. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996); 42 U.S.C. § 6972(f).

would not be able to seek contribution from other parties that contributed to the contamination, even though the company's remediation may have been required by EPA as a condition to continued operation of its facility. According to Petitioner, to recover in contribution against other PRPs, the company would instead have to shut down its facility and invite a CERCLA civil enforcement action. The recent decision of the district court in *DuPont* makes clear this is not an extreme hypothetical, but rather the logical implication of Petitioner's argument. *See DuPont*, 297 F. Supp. 2d at 752 ("The simple fact is DuPont could legally choose not to use the Kentucky site for industrial or commercial purposes. DuPont could sell or gift the land. DuPont could allow the land escheat to the state for failure to pay taxes."). It is inconceivable that Congress intended to condition the sharing of costs among responsible parties on a company's willingness to close its viable business or defy EPA's administrative enforcement orders.

IV. PETITIONER'S INTERPRETATION OF SECTION 113(f)(1) WOULD DEFEAT CONGRESS'S INTENTION TO TREAT THE UNITED STATES, WHEN THE UNITED STATES IS A PRP, THE SAME AS ANY OTHER PRP

Petitioner's (and the United States's) position on Section 113(f)(1) is fundamentally inconsistent with the broad waiver of sovereign immunity embodied in CERCLA. Section 120(a)(1) of CERCLA provides that:

> [e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1).[13]

This "'unequivoca[l] express[ion]' of the Federal Government's waiver of its own sovereign immunity," *Union Gas*, 491 U.S. at 10 (citation omitted) (alteration in original), makes clear that the United States, as a PRP, is to be treated no different from any other PRP.[14] *See* H.R. Rep. No. 99-253 (I), at 95, *reprinted in* 1986 U.S.C.C.A.N. at 2877. Although the legislative history of CERCLA itself contains no reference to Congress's intent in adopting this section, one of CERCLA's sponsors confirmed the intent the Court discerned in *Union Gas*. At a 1984 hearing on possible amendments to CERCLA, Senator Robert Stafford lectured a Department of Defense witness that

> [w]hen those of us on this committee sat here in 1979 and 1980 drafting the Superfund law, we all agreed that the Federal Government was to be treated just like any other responsible party. The obligations of the Federal Government were to be exactly the same as those of a private citizen, no more and no less. We think we made this absolutely clear in some of the law's provisions. ... We included these provisions in the law for several policy reasons. *First, based on our experience in other environmental laws, we believed there was a distinct possibility the Federal Government would seek to treat itself differently from private citizens.* ... I will conclude by saying that these provisions were discussed during markup by this committee, and I don't recall any dissent. Despite these explicit provisions, the law has been implemented in a way that, for practical purposes, exempts the Department of Defense and other Federal facilities from the Superfund requirement. Would you please explain why the committee was possibly wrong in deciding that the Department of Defense should be treated exactly as private parties?

Hearings Before the Committee on Environment and Public Works, United States Senate, May 23, 1984, at 343 (statement of Sen. Stafford) (emphasis added).

The United States's interpretation of Section 113(f)(1) would as a practical matter destroy Congress's vision by cutting off the government's liability for contamination it caused at hundreds of facilities where remediation has been completed or is still ongoing. Congress's primary concern in enacting the waiver of sovereign immunity is no less a concern today, when the government's position on CERCLA contribution would permit it to engage in strategic gaming to avoid paying the costs of remediation for which it is responsible.[15]

Petitioner's and the United States's interpretation of Section 113(f)(1) would create numerous options for strategic gaming by the government to avoid liability for contamination the government itself is responsible for.

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[13] This provision was originally codified in CERCLA at 42 U.S.C. § 9607(g) and was moved without substantive changes to 42 U.S.C. § 9620(a)(1) by the SARA amendments.

[14] Lower courts similarly have interpreted the waiver of sovereign immunity in CERCLA broadly to give effect to Congress's purpose that the parties responsible for contamination—including the United States—bear the costs of the remediation. *See United States v. Shell Oil Co.*, 294 F.3d 1045, 1052-53 (9th Cir. 2002); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 840-41 (3d Cir. 1994) (stating that "if the United States, even as a regulator, operates a hazardous waste facility or arranges for the treatment or disposal of hazardous wastes, it should be held responsible for cleanup costs, just as any private business would be"); *East Bay Mun. Util. Dist. v. United States*, 948 F. Supp. 78, 88 (D.D.C. 1996), *aff'd*, 142 F.3d 479 (D.C. Cir. 1998).

[15] The government's potential liability for remediating contaminated properties is enormous. A report by the GAO indicated that the $307 billion in environmental liabilities which the government listed in its fiscal year 2001 budget did not completely encompass all of the government's potential environmental liabilities. *See* GAO, Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities, at 7 (Jan. 2003), *available at* http://www.gao.gov/rew.items/d03219.pdf (last visited Apr. 4, 2004).

First, the government could simply choose to avoid any enforcement at such sites. Second, the EPA could issue a Section 106 order to a PRP, requiring it to undertake a cleanup; if the target party complies, the United States would take the position, as it does before the Court, that that party would have no right of contribution. *See* U.S. Br. at 22 n.11. Third, the government could require RCRA corrective action in lieu of a CERCLA listing and thereby impose the entire cost of response on the current owner or operator of the facility. Fourth, the government could bring an action for injunctive relief under RCRA Section 7003, 42 U.S.C. § 6973, seeking to compel cleanup and impose fines. So long as it avoids a civil action under Section 106 or 107, the United States could rest assured that, unlike other PRPs, it would not have to pay the costs of remediating contamination for which it was responsible.[16]

Interpreting Section 113(f)(1) to permit a contribution action only during or following a civil action under Section 106 or 107 would in these ways permit the United States effectively to render meaningless Congress's broad waiver of sovereign immunity. The various means by which the United States could limit a responsible party's recourse against other polluters would have the pernicious effects of distorting the government's enforcement priorities and allowing the United States to evade liability for its own role in contaminating property. Congress plainly never intended that result.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[16] There is no danger of EPA forcing the government to shoulder its responsibilities, as EPA has long been prohibited from proceeding under CERCLA against other federal agencies without the approval of DOJ. *See* Exec. Order 12,580 § 4(e), 52 Fed. Reg. 2923 (Jan. 23, 1987). In practice, DOJ does not permit EPA to seek cost recovery or issue cleanup orders under CERCLA to other federal agencies.

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Supreme Court, U.S.
FILED
APR 8 - 2004
OFFICE OF THE CLERK

No. 02-1192

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

AVIALL SERVICES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a party that is "potentially responsible" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and that voluntarily remediates a contaminated site, can sue under CERCLA to recover its response costs from other potentially responsible parties.

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BRIEF OF LOCKHEED MARTIN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a party that engages in the voluntary remediation of hazardous waste may sue under CERCLA to recover cleanup costs from other responsible parties. *Amicus* has a significant interest in the correct resolution of this question because—consistent with one of CERCLA's principal objectives—it has initiated voluntary remediation activities at several sites throughout the United States and could be left without an effective mechanism to recover even a portion of its cleanup costs if the decision below were reversed.

Lockheed Martin Corporation is one of the world's leading advanced technology companies. Approximately eighty percent of Lockheed Martin's business is with the United States Department of Defense and various federal agencies and includes aeronautical research and development, the manufacture of tactical aircraft and strategic missile systems, the development of space launch and satellite programs, and other projects closely related to the Nation's defense. In connection with this work, Lockheed Martin owns or operates a number of facilities that were formerly owned or operated by the federal government or at which work is performed pursuant to government contracts.

Lockheed Martin has expended millions of dollars implementing voluntary remediation programs at several of these facilities in reliance upon its right under CERCLA to recover response costs from other responsible parties—

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

including the federal government. Lockheed Martin is concerned that if such a recovery right were deemed to be unavailable, the incentive to engage in voluntary cleanups would be significantly reduced and companies that engage in voluntary remediation activity unjustly and unjustifiably would be forced to bear costs that are in large part attributable to other parties.

STATEMENT

1. In 1981, Aviall Services, Inc. ("Aviall") purchased from Cooper Industries, Inc. ("Cooper") four facilities at which Cooper had serviced and maintained aircraft engines. Pet. App. 48a. After the acquisition, Aviall continued to operate this business and discovered that both it and Cooper had contributed to contamination at the facilities. *Id.* Aviall promptly notified the Texas Natural Resource Conservation Commission ("TNRCC"), which informed Aviall that it was in violation of state environmental laws and directed Aviall to initiate cleanup activity. *Id.* Although the TNRCC threatened to pursue an enforcement action if Aviall failed to implement a remediation program, neither it nor the United States Environmental Protection Agency ("EPA") has taken judicial or administrative measures under CERCLA to compel cleanup. Pet. App. 48a-49a.

In 1984, Aviall voluntarily began remediation of the facilities (Pet. App. 48a) and to date has incurred approximately $5 million in cleanup costs (Jt. App. 36a). Aviall has since sold the facilities but remains contractually obligated to complete the cleanup, the eventual cost of which is estimated to be $21 million. Pet. App. 48a; Jt. App. 36a.

2. In 1997—while the cleanup was underway—Aviall sued Cooper in the United States District Court for the Northern District of Texas seeking to recover response costs under Sections 107(a) and 113(f)(1) of CERCLA and state law. Section 107(a)(1)-(4) of CERCLA imposes strict liability on four categories of parties—owners, operators, disposers, and transporters—that contribute to the release of hazardous waste. 42 U.S.C. § 9607(a)(1)-(4). Section

107(a)(4)(A)-(D) makes these "covered persons" liable for, among other things, "*any* . . . necessary costs of response incurred by *any* . . . person." 42 U.S.C. § 9607(a)(4)(B) (emphases added).[2] Section 113(f)(1) authorizes parties to seek contribution from other potentially responsible parties "during or following" an enforcement action under Section 106 or 107(a) and provides that "[n]othing . . . shall diminish the right of any person to bring an action for contribution in the absence of" an action under those sections. 42 U.S.C. § 9613(f)(1).

Aviall pleaded its suit in a manner consistent with the view—expressed by the United States for more than a decade—that CERCLA "authorizes private persons to bring actions to recover response costs which they incur at a site, whether those actions are taken under compulsion by EPA or voluntarily." U.S. *Amicus* Br. at 3-4, *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) (No. 92-3820) (discussed *infra*). Its suit also conformed to Fifth Circuit precedent, which holds that a CERCLA contribution action arises jointly through the operation of Sections 107(a) and 113(f)(1). *See Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 924 (5th Cir. 2000).

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[2] Covered persons are liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 104(i).

42 U.S.C. § 9607(a)(4)(A)-(D). The national contingency plan referenced in subparagraph (B) consists in part of regulations promulgated by the EPA to implement CERCLA. *See* 40 C.F.R. pt. 300.

3. Cooper moved for summary judgment on Aviall's CERCLA claim on the ground that Aviall could not seek contribution because it had not first been made the subject of a civil action under Section 106 or 107(a). The district court agreed and entered summary judgment for Cooper, explaining that under its interpretation of Section 113(f)(1) a "plaintiff is precluded from seeking contribution" if it "cannot allege any prior or pending CERCLA enforcement action against it." Pet. App. 97a.[3]

A divided panel of the Fifth Circuit Court of Appeals affirmed. The majority emphasized the limitations seemingly embodied in the language of Section 113(f)(1)'s first sentence—its enabling clause—and concluded that this provision requires a potentially responsible party ("PRP") "seeking contribution from other PRPs to have filed a § 113(f) claim 'during or following' a federal CERCLA action against it." Pet. App. 52a. The panel opined that "Congress wanted only a limited right of contribution" that did not "go beyond the traditional common law definition of contribution." Pet. App. 65a. The panel also surmised that its interpretation would not discourage voluntary cleanups because parties "may" be able to "rely on state environmental laws to recover costs." *Id.*

Judge Wiener dissented, resting his analysis upon the final sentence of Section 113(f)(1)—its saving clause—which states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107." 42 U.S.C. § 9613(f)(1). Whereas the majority read this clause as merely preserving *state-law* contribution claims, Judge Weiner explained that he "read the savings clause to mean precisely what it says"—*i.e.*, that Aviall could bring its contribution claim because "[n]othing" in Section 113(f)(1)

[3] Having entered summary judgment for Cooper on Aviall's CERCLA claim, the district court declined to exercise supplemental jurisdiction over Aviall's state-law claims. Pet. App. 99a.

diminishes the right of a PRP to bring a contribution action at any time. Pet. App. 75a.

4. On rehearing *en banc*, the Fifth Circuit reversed the panel decision. Unlike the panel, the *en banc* court concluded that Aviall's suit was not precluded by the "during or following" language of Section 113(f)(1)'s enabling clause. Instead, it explained that "Section 113(f)(1) authorizes suits in *both* its [enabling clause] and [savings clause]." Pet. App. 14a (emphasis added). The court rejected the view that the savings clause preserves only state-law claims, and—citing this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994)—concluded that the savings clause *also* "preserve[s] contribution actions arising by federal common law under § 107." Pet. App. 26a. Because the Section 107(a) contribution actions preserved by Section 113(f)(1)'s savings clause need *not* be brought "during or following" a CERCLA enforcement action, the court reasoned, "a PRP may sue at any time for contribution under federal law." Pet. App. 14a.

The *en banc* court emphasized that its decision comports with Section 113(f)(1)'s legislative history and that a contrary decision would undermine the principal objectives of CERCLA "by slowing the reallocation of cleanup costs from less culpable PRPs to more culpable PRPs and by discouraging the voluntary expenditure of PRP funds on cleanup activities." Pet. App. 31a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that CERCLA authorizes Aviall's suit against Cooper. Section 107(a) of CERCLA imposes liability on any potentially responsible party for "the necessary costs of response" incurred by any other potentially responsible party. As this Court recognized in *Key Tronic*, 511 U.S. at 816, and as the United States has advised the lower courts for more than a decade, that section creates an implied right of action authorizing PRPs to sue other PRPs for response costs.

Far from precluding Aviall's suit, as contended by Cooper and the government, Section 113(f)(1) expressly preserves Aviall's Section 107(a) action in these circumstances. Although Section 113(f)(1)'s *enabling* clause contemplates the availability of contribution claims "during or following" Section 106 and 107(a) civil actions, Section 113(f)(1)'s *savings* clause makes clear that contribution actions need *not* be brought exclusively "during or following" such proceedings. Rather, as the court of appeals correctly observed, the savings clause *preserves* the independent rights of action that are authorized by Section 107(a). Pet. App. 26a. Because Aviall's suit arises under Section 107(a), its claim falls within Section 113(f)(1)'s savings clause, and the "during or following" limitation in the first sentence of Section 113(f)(1) does not impose a barrier to Aviall's suit.

Permitting PRPs to recover voluntarily incurred cleanup costs is consistent with CERCLA's purpose and legislative history. At the time Section 113(f)(1) was enacted in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), it was well-established that "voluntary" remediators—that is, parties undertaking cleanup in the absence of an action under Section 106 or 107(a)—possessed contribution rights against other PRPs. Nothing in SARA purported to alter or abridge those rights. On the contrary, SARA was enacted precisely *because* Congress recognized that enforcement action by the EPA alone could not effectively vindicate CERCLA's goals. Section 113(f)(1) was enacted to encourage voluntary cleanups in the private sector by confirming and preserving the right of PRPs to recover response costs from other PRPs. Suits like Aviall's thus accomplish *precisely* what Congress intended.

A rule precluding PRPs from recovering voluntarily incurred response costs under CERCLA would have consequences that are dramatic and unfair. Voluntary remediation efforts would be brought to a halt, and at sites at which cleanup is underway, PRPs would refuse to incur additional response costs until the federal government initiated an enforcement action giving rise to contribution rights. The federal government (which previously advocated the reading of Section 107(a) and 113(f)(1) urged by Lockheed Martin here) also would receive a tremendous windfall from the new position it now urges upon this Court, because the United States is itself a PRP at thousands of sites across the country. Under the rule espoused by Cooper and the United States, no PRP could sue the federal government for contribution unless the government first initiated an enforcement action against that PRP under Section 106 or 107(a). The federal government thus would effectively be given the power to immunize itself against the enormous liabilities it faces in connection with sites that are currently being remediated on a voluntary basis. Such a sweeping enforcement gap would fatally undermine the legislative objectives that prompted the enactment of CERCLA and SARA and would upset the settled expectations of countless companies that have entered into acquisitions or undertaken cleanup efforts in the expectation that—consistent with the government's long-standing representations to the lower federal courts—CERCLA affords them a mechanism to recover their response costs.

ARGUMENT

I. AVIALL'S SUIT IS AUTHORIZED UNDER SECTION 107(a) AND PRESERVED BY SECTION 113(f)(1)'S SAVINGS CLAUSE.

Section 107(a) imposes liability on—and confers a private cause of action against—parties such as Cooper that formerly conducted activities that contributed to the release of hazardous waste. Aviall's complaint pleaded a claim against Cooper under Section 107(a). Because that Section expressly authorizes contribution suits even in the absence of a pending government enforcement action under Section 106 or 107(a), Aviall's suit against Cooper is authorized under CERCLA.

A. Aviall's Cause Of Action Originates Under Section 107(a).

1. As this Court has repeatedly observed, "[w]hen interpreting a statute, we look first and foremost to its text." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). That principle is dispositive here because the plain language of Section 107(a) authorizes *any* person who has engaged in the remediation of hazardous waste—*including* a PRP such as Aviall—to recover its cleanup costs from *any* "covered person." 42 U.S.C. § 9607(a)(4)(B). Because Aviall's suit falls squarely within the scope of private suits authorized by Section 107(a), this case can begin—and end—with a straightforward application of that provision.

This Court has expressly recognized that Section 107(a) authorizes potentially responsible parties to sue other PRPs to recover voluntarily incurred response costs. In *Key Tronic Corp. v. United States*, 511 U.S. 809, this Court held that Key Tronic could recover initial response costs from the Air Force in a suit under Section 107(a). Even though Key Tronic and the Air Force had both contributed to contamination (thus making each a PRP), and even though Section 113(f)(1) already had been enacted, no member of this Court (nor the federal government) so much as questioned the availability of a Section 107(a) claim to a PRP seeking response costs from other PRPs. *See id.* at 811.

Instead, the focus of the Court's analysis was directed to whether Section 107 "*impliedly* authorizes private parties to recover cleanup costs from other PRPs," as the majority held (*id.* at 818 (emphasis added)), or whether it *expressly* did so—as the dissenters urged. *Id.* at 822 (Scalia, J., dissenting) (under the "plain language" of Section 107(a)(4)(B), "a party who has incurred costs to clean up a hazardous waste site can recover those costs from any other party liable under CERCLA"). But every Justice agreed that Section 107(a) authorizes a PRP to recover response costs "from other PRPs." *Id.* at 818. The *Key Tronic* Court fully recognized that Section 113(f)(1) separately authorizes contribution actions, but it had little trouble harmonizing Sections 107(a) and 113(f)(1) through the observation that in light of the 1986 SARA amendments "the statute now expressly authorizes a cause of action for contribution in § 113 *and impliedly authorizes a similar and somewhat overlapping remedy in § 107*." *Id.* at 816 (emphasis added).[4]

Key Tronic's holding is particularly significant because the "response costs" for which Key Tronic sought recovery under Section 107(a)—and to which this Court *held* Key Tronic was entitled—were incurred voluntarily, in that Key Tronic expended them independently from the enforcement actions that the EPA and state regulators initiated against it. Although Key Tronic and the Air Force later entered into settlements with the EPA to resolve their respective CERCLA liabilities to the United States, Key Tronic's claim under Section 107(a) sought recovery of legal fees it *voluntarily* incurred in identifying other PRPs—response costs that had nothing to do with the payment Key Tronic later made in its federal settlement. Thus, no meaningful distinction can be drawn between the "voluntariness" of the response costs incurred by Key Tronic and the response costs incurred by Aviall here.

In light of Section 107(a)'s plain text and this Court's decision in *Key Tronic*, there can be no serious dispute that Section 107(a) grants a private cause of action against "cov-

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[4] The government refers to *Key Tronic*'s conclusion that PRPs can sue other PRPs under Section 107(a) to recover response costs as "passing dictum." U.S. *Amicus* Br. at 20 n.9. But that is incorrect. The *holding* in *Key Tronic* is that a PRP can pursue a Section 107(a) action against another PRP to recover certain attorneys' fees incurred in connection with cleanup activity. The Court's conclusion that Section 107(a) impliedly authorizes suits by PRPs against other PRPs obviously was necessary to this result and thus cannot be described as "dictum" even under the broadest interpretation of that term. *See California v. FERC*, 495 U.S. 490, 501 (1990) (an issue of statutory interpretation addressed by this Court is not dictum where it is "necessary for, and integral to" the Court's holding).

ered persons" to *any* person—including a PRP—who has incurred response costs, and that such a cause of action exists apart from the first sentence of Section 113(f)(1). Indeed, such an "extrinsic" cause of action is expressly saved by the last clause of Section 113(f)(1). No one disputes that Cooper falls within the statutory definition of a "covered person" or that Aviall has incurred response costs. Section 107(a) therefore expressly affords Aviall the right to recover its cleanup costs from Cooper, and the decision below can be affirmed on that basis.

2. Cooper and the government go to great lengths to suggest that in the district court Aviall somehow "abandoned" its claim under Section 107(a). But this is a demonstrably incorrect reading of the record. *See* Br. Opp'n Pet. Writ Cert. at 1-2.

To begin with, the Second Amended Complaint (the operative pleading) states on the first page that "[t]his is a civil action, under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* . . . seeking . . . reimbursement of certain investigation and remediation costs." Jt. App. 48a. Aviall expressly captioned its fifth cause of action "Liability under CERCLA" and referenced both Sections 107(a) and 113(f)(1). Jt. App. 62a-63a. The operative pleading on its face thus makes clear that Aviall has sued "under" Section 107(a) of CERCLA and refutes the strained suggestion that Aviall "abandoned" that claim.

Cooper and the government premise their waiver argument on the supposition that in its first and second amended complaints Aviall "omitted" a freestanding cause of action under Section 107(a) that had appeared in the original complaint. Cooper Br. at 3 & n.1; U.S. *Amicus* Br. at 21 n.10. But as Aviall has consistently maintained, the amended complaints did not abandon—and were not designed to abandon—an independent cause of action under Section 107(a). Instead, the complaint was amended to plead the contribution cause of action in the manner prescribed by Fifth Circuit law,

which maintains that a cause of action for contribution arises under Section 107(a) but is governed by Section 113(f)(1)'s "procedural framework." *See Geraghty & Miller*, 234 F.3d at 924 ("[W]hile section 113(f) is the vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107.").

By pleading its claim under CERCLA in this manner, Aviall did not "abandon" its claim under Section 107(a). Nothing required Aviall to plead its contribution claim in a manner inconsistent with controlling Fifth Circuit precedent. As this Court has observed, it is "unreasonable" to "impose, as an absolute condition to [this Court's review of] an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent." *United States v. Williams*, 504 U.S. 36, 44 (1992). Indeed, *Williams* reflects this Court's acceptance of an anti-waiver argument advanced by the United States to preserve *its* ability to seek reversal of circuit precedents with which it seemingly had agreed in the courts below. *See id.* Similarly, Aviall should not be taxed with "waiver" for conforming its pleadings to controlling law.

Furthermore, the "waiver" claim advanced by Cooper and the government cannot be reconciled with how each interprets the interplay of Sections 107(a) and 113(f)(1). It is well-established that the cause of action available to one PRP to sue another PRP arises under Section 107(a).[5] The language of CERCLA itself expressly references the fact that Section 107(a) is the authorizing provision for contribution

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[5] *See Sun Co. v. Browning Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997) ("It is thus clear that . . . a § 113(f) action for contribution *is* an action under § 107") (internal quotation marks and citation omitted) (emphasis in original); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997) ("Section 113(f) . . . does not create the right of contribution—rather the source of a contribution claim is section 107(a).") (citation omitted).

actions. *See* 42 U.S.C. § 9613(h)(1) (referring to an "[a]ction *under Section 107* to recover response costs or damages *or for contribution*") (emphases added). Indeed, Cooper and the government *concede* that Section 107(a)—not Section 113(f)(1)—creates *all* CERCLA contribution rights. *See* Cooper Br. at 25; U.S. *Amicus* Br. at 20-21.[6] It is difficult to credit any suggestion that Aviall "abandoned" a claim under Section 107(a) when that provision is *conceded* by petitioner and its *amicus* to be the source of Aviall's right to sue in these circumstances.

Moreover, Aviall expressly argued in the court of appeals that if the court were to conclude that Section 113(f)(1)'s "during or following" limitation barred its claim, its suit should be permitted to proceed independently under Section 107(a). *See* Aviall Resp. Br. at 24 ("[P]arties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery under section 107(a)."); Aviall Supplemental Br. at 24 (same). Because Aviall asserted its claim under Section 107(a) below, it may properly rely upon that ground to defend the lower court's judgment before this Court. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised

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[6] *See also* Oral Argument Transcript, *Key Tronic*, No. 93-376, 1994 WL 664971, at *23-24 (Mar. 29, 1994) (statement of Deputy Solicitor General Wallace) ("We do not contest that there is an implied cause of action under 9607 to recover contribution of costs. And that was confirmed by Congress in adding a contribution provision in the 1986 amendments in 9613, but that does not itself provide the cause of action; it provides *guidelines* for the cause of action.") (emphasis added); U.S. *Amicus* Br. at 11, *Pinal Creek* (No. 97-795) ("The court of appeals correctly recognized that Sections 107 and 113 work together—the first section *creating* the claim for contribution between PRPs, and the second qualifying the nature of that claim.") (internal quotation marks omitted) (emphasis added).

below, so long as that party seeks to preserve, and not to change, the judgment.").[7]

3. In an equally unavailing attempt to dissuade the Court from affirming based upon the plain meaning of Section 107(a), Cooper and the government assert that courts have "uniformly" determined that PRPs are not permitted to seek response costs from other PRPs under Section 107(a). Cooper Br. at 34-35; U.S. *Amicus* Br. at 6. These arguments obviously ignore this Court's contrary conclusion in *Key Tronic* and in any event are indefensible on their own terms.

Contrary to the claims of Cooper and the government, there is nothing remotely close to a "uniform" conclusion in the circuits that a PRP that has voluntarily incurred response costs is precluded from suing other PRPs under Section 107(a). Indeed, several courts have expressly recognized that a PRP that has voluntarily undertaken cleanup *can* pursue a Section 107(a) cost-recovery action against other responsible parties. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993) (Posner, J.) (PRP could pursue a Section 107(a) claim against another PRP because "the statute permits one responsible person to recover all or part

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[7] In any event, this Court has made clear that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991) (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). As *Kamen* made clear, in those rare cases in which it is appropriate to apply a "truncated body of law" as a "sanction" for a party's failure to rely on favorable law, a court should *never* issue an opinion that might be construed by lower courts and other parties as "binding precedent" on the waived points. *Id.* at 100 n.5. Here, if Cooper were correct that waiver *has* been established (it is not), this case would become nothing but a fact-bound inquiry into the effect of such a purported waiver on the rights of two particular, identified PRPs. Thus, any construction of the scope of contribution rights under Section 113(f)(1) premised on the waiver of Aviall's claim under Section 107(a) would render this case unworthy of this Court's attention, and therefore should lead to dismissal of the writ.

of its response costs from another"); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir. 1993) ("[I]n the event the private-action plaintiff itself is potentially 'liable' to the EPA for response costs, and thus is akin to a joint 'tort-feasor,' section 9607(a)(4)(B) serves as the *pre-enforcement* analog to the 'impleader' contribution action permitted under section 9613(f)."') (emphasis in original); *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221 (E.D. Pa. 1995) (a PRP that voluntarily engages in cleanup may pursue other PRPs under Section 107(a)).[8]

Moreover, the government itself has repeatedly brought suit under Section 107(a) in circumstances in which it is a PRP, and there is nothing in the text of Section 107(a) or elsewhere in CERCLA that would afford the federal government a broader remedial right than what is available to private parties. *See United States v. Wallace*, 961 F. Supp. 969, 975 (N.D. Tex. 1996) ("potential liability for contribution does not affect the government's right to full recovery of its response costs" in a Section 107(a) action); *United States v. Hunter*, 70 F. Supp. 2d 1100, 1108 (C.D. Cal. 1999) (same).

To be sure, several courts have held that a PRP cannot sue other responsible parties under Section 107(a) for *joint and several* liability. *See* U.S. *Amicus* Br. at 6 n.2. But that question is fundamentally distinct from the question whether a PRP can sue under Section 107(a) for *contribution*. No court has held that Section 107(a) precludes a contribution action by a voluntary remediator against other PRPs. Indeed, only one court—the Ninth Circuit—has squarely held that Section 107(a) suits are unavailable to voluntary remediators (*see Pinal Creek*, 118 F.3d at 1302), but in that case the

[8] The question also has been expressly left open by several courts. *See, e.g., Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 n.10 (6th Cir. 1998) ("This case does not involve a PRP who initiated cleanup voluntarily without any governmental prodding, and we express no opinion with regard to such a party's right to seek joint and several cost recovery [under Section 107(a)].").

plaintiff PRPs sought to impose joint and several liability, and the Ninth Circuit already had decided that a voluntary remediator could pursue a *contribution* action against other PRPs under Section 113(f)(1). *See, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 691 (9th Cir. 1992). Thus, the alarmist suggestion that an unbroken line of cases in the lower courts precludes a PRP that has voluntarily incurred response costs from suing other PRPs for contribution under Section 107(a) simply does not withstand scrutiny. Aviall's suit arises under—and is independently authorized by—Section 107(a).

B. Aviall's Claim Is Preserved By Section 113(f)(1)'s Savings Clause.

Nothing in Section 113(f)(1) precludes Aviall's suit. Section 113(f)(1)'s "savings clause" provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107." 42 U.S.C. § 9613(f)(1). As both Cooper and the government correctly recognize, this "savings provision . . . preserve[s] any *independent* right to contribution that exists apart from Section 113(f)(1)." U.S. *Amicus* Br. at 16 (emphasis in original); Cooper Br. at 20 (the savings clause "preserve[s], undiminished, *other* contribution rights that may exist elsewhere," including "federal rights of action for contribution that can be maintained outside Section 113(f)(1)") (emphasis in original). Aviall's cause of action arises under Section 107(a)—a provision that "exists apart from" Section 113(f)(1)—and thus falls squarely within the savings clause.

1. Cooper and the government contend that any construction of Section 113(f)(1) that encompasses Aviall's claim would improperly convert the "savings" clause into an enabling clause. Cooper Br. at 20-21; U.S. *Amicus* Br. at 15-16. But those arguments reflect a fundamental misunderstanding of the function of the last sentence of Section 113(f)(1). As the court of appeals correctly recognized, Section 113(f)(1)'s savings clause "*preserve*[*s*] contribution ac-

tions arising by federal common law under § 107." Pet. App. 26a (emphasis added). Section 113(f)(1)'s last sentence plays the traditional role of a savings clause by preserving claims that arise from sources independent of the enabling clause.

Cooper and the government also assert that the savings clause encompasses only state-law claims because to hold otherwise would allow the savings clause to swallow the enabling clause. But there is no textual basis for the claim that Section 113(f)(1)'s savings clause applies only to state-law claims, and in light of CERCLA's legislative history (reviewed below) there is nothing "anomalous" in according the savings clause its plain meaning in this context.

2. Petitioner and its *amicus* expend much effort arguing that Aviall's suit is not consistent with the traditional understanding of "contribution" and that CERCLA's "contribution" provision therefore does not authorize (or save) Aviall's claim. Cooper Br. 27-29; U.S. *Amicus* Br. 17-19. But the debate about whether Aviall's claim is—or is not—a claim for "contribution" misses the point. If Cooper and the government are correct that Aviall's claim is not an action for "contribution," then Aviall's cost-recovery action under Section 107(a) is entirely *unaffected* by the "during or following" limitation imposed on CERCLA "contribution" actions by the first sentence of Section 113(f)(1). Instead, Aviall's "implied" right under Section 107(a)—the remedy "similar [to] and somewhat overlapping" (*Key Tronic*, 511 U.S. at 816) with the contribution claim authorized by Section 113(f)(1)—would independently authorize Aviall's suit against Cooper, just as it authorized Key Tronic's suit for response costs against the Air Force. And if Aviall's claim is characterized as a claim for "contribution"—as the court of appeals concluded—it is expressly saved by Section

113(f)(1)'s savings clause. Whatever label may be assigned to Aviall's claim, its suit is authorized under CERCLA.[9]

C. Aviall's Suit Is Consistent With CERCLA's Purpose And Legislative History.

CERCLA's objectives and legislative history confirm that a voluntary remediator such as Aviall can sue under CERCLA to recover response costs from other PRPs in the absence of a pending or completed enforcement action.

1. Congress enacted CERCLA to accomplish two goals: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups." H.R. REP. NO. 253, 99th Cong., 1st Sess., Pt. 3, at 15 (1985). Congress intended both goals to be achieved by promoting *voluntary* cleanup efforts by the private sector—efforts Congress sought to encourage through enactment of the liability and remedial provisions of Section 107(a). The relevant committee reports associated with CERCLA's enactment are replete with statements that Section 107(a)'s strict liability regime was enacted "*to induce persons voluntarily* to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. REP.

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[9] The government invokes the principle that Congress should "not be construed as making any innovation upon the common law which it does not fairly express." U.S. *Amicus* Br. at 19 (citation omitted). But reliance on that principle is misplaced here because "[a]t common law there was no right to contribution among joint tortfeasors." *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 86 (1981). Over time, that rule was modified "by statute or judicial decision" (*id.* at 86-87), such that, at the time CERCLA and SARA were enacted, the right of contribution among joint tortfeasors was almost uniformly accepted. The relevant inquiry is not whether a battle of citations establishes that analogous suits "at common law" were deemed to be actions for "contribution," but rather whether Congress—in enacting CERCLA and the 1986 SARA amendments—intended parties in Aviall's circumstances to sue other PRPs to recover response costs. The statutory text demonstrates that the answer to that question is clearly yes. *See also infra* Part C.

No. 1016, 96th Cong., 2d Sess., at 17 (1980) (emphasis added); *see also* S. Rep. No. 848, 96 Cong., 2d Sess., at 31 (1980) ("This liability standard is intended to induce potentially liable persons to *voluntarily mitigate damages* rather than simply rely on the government to abate hazards.") (emphasis added).[10]

Indeed, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the controlling plurality of the Court recognized that the private cause of action afforded to PRPs by CERCLA "came about only after Congress had tried to solve the problem posed by hazardous substances through other means." *Id.* at 21. Those Justices explained:

> Prior statutes such as the Resource Conservation and Recovery Act of 1976 had failed in large part because they focused on preventive measures to the exclusion of remedial ones. The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.

Id. (citations omitted) (emphasis in original). *Union Gas* went on to explain that the entire purpose of CERCLA's remedial scheme was to encourage voluntary remediation by providing PRPs a cause of action against other PRPs for response costs:

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same

[10] *See also* 126 Cong. Rec. 26338 (Sept. 19, 1980) (statement of Rep. Florio) ("[Section 107] accomplishes three objectives. It assures that the costs of chemical poison releases are borne by those responsible for the releases. It creates a strong incentive both for prevention of releases *and voluntary cleanup* of releases by responsible parties.") (emphasis added).

> time. Some help was needed, and Congress sought to encourage that help *by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from other potentially responsible parties.*

Id. at 21-22 (emphasis added).[11]

When Congress took up deliberations on the 1986 SARA amendments, its preoccupation with encouraging voluntary remediation had not dissipated. The committee reports again consistently and repeatedly emphasized that "[v]oluntary cleanups are essential to a successful program for cleanup of the Nation's hazardous substance pollution problem." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 5, at 58 (1985).[12] The unmistakable clarity of the legislative history on this point prompted one court to observe that "the recurring theme of facilitating prompt action to remedy environmental blight . . . [was] echoed . . . with even greater force [in SARA] than [in] CERCLA's original enactment in 1980." *United States v. Monsanto Co.*, 858 F.2d 160, 170 & n.18 (4th Cir. 1988).

2. Against this backdrop, it cannot plausibly be suggested that Aviall's suit is inconsistent with congressional

[11] No Justice disagreed with this analysis. Justice Scalia concurred with the plurality that Congress sought in CERCLA to abrogate the States' sovereign immunity, but he (along with three other Justices) concluded that Congress lacked the power to do so. *See Union Gas*, 491 U.S. at 29 (Scalia, J., dissenting in part). That latter view prevailed in *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996), which reversed *Union Gas* on Eleventh Amendment issues but not on the interpretation of CERCLA set forth above.

[12] *See also* 131 Cong. Rec. 24730 (Sept. 24, 1985) (statement of Sen. Domenici) ("The goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.").

intent. Before Congress amended CERCLA in 1986 by adding Section 113(f)(1), it was firmly established that Section 107(a) afforded a PRP the right to recover voluntarily incurred cleanup costs from other responsible parties. In *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), for example—the case correctly characterized by the court of appeals as the "seminal" decision (Pet. App. 15a)—the City of Philadelphia sought to recover cleanup costs from companies that had contributed to contamination at a city landfill. The district court recognized that the City itself was potentially liable for response costs but nevertheless held that the City could pursue an action under Section 107(a). *Id.* at 1143; *see also City of New York v. Exxon Corp.*, 633 F. Supp. 609, 616-17 (S.D.N.Y. 1986) (stating, before the enactment of SARA, that the "private recovery provisions of [CERCLA] . . . assure an incentive for private parties, *including those who may themselves be subject to liability under the statute*, to take a leading role in cleaning up hazardous waste facilities as rapidly and completely as possible.") (emphasis added).

A significant number of pre-SARA decisions followed *Stepan Chemical* by expressly holding that PRPs have the right to recover voluntarily incurred cleanup costs under CERCLA. *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *Pinole Point Props., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 290-91 (N.D. Cal. 1984); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913, 916 (N.D. Okla. 1987); *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986); *Velsicol Chem. Corp. v. Reilly Tar & Chem. Corp.*, No. CIV-1-81-389, 1984 U.S. Dist. LEXIS 24317, at *11 (E.D. Tenn. Aug. 16, 1984).

Thus, when Congress added Section 113(f)(1) to CERCLA it was widely understood that PRPs possessed a right to pursue actions under Section 107(a) to recover voluntarily incurred cleanup costs. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it

expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Nothing suggests that Congress's decision to enact SARA was in any way prompted by a desire to *curtail* these remedial rights—indeed, nothing in SARA modified Section 107(a). *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). It is immaterial whether Congress believed such cost-recovery claims to be outside the realm of "contribution" and thus directly and independently authorized by Section 107(a),[13] or whether (as the court of appeals concluded) Congress deemed these claims to sound in contribution and affirmatively preserved them through enactment of Section 113(f)(1)'s savings clause.[14] No rational observer could contend that through SARA Congress sought to cut *back* on the right of PRPs that voluntarily remediate contaminated sites to recover their response costs under CERCLA.

D. Aviall's Suit Does Not Create Anomalies In CERCLA's Liability Scheme.

Cooper and the government suggest that affording Aviall a right to sue in these circumstances would create anomalies in CERCLA's liability framework. These arguments simply do not withstand scrutiny.

1. *Double Liability*: The government contends that permitting PRPs to recover voluntarily incurred cleanup costs

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[13] It may well be, as Cooper contends, that in enacting Section 113(f)(1) "Congress' concern was not with . . . direct cost recovery actions [under Section 107(a)] . . . but rather was with the separate line of cases . . . that had specifically found an implied right of contribution under section 107(a)." Cooper Br. at 24 n.18. But if that were so, Aviall's suit can and should proceed independently under Section 107(a).

[14] The court of appeals stated that Section 113(f)(1) was enacted to confirm that the lower courts "had been right" to afford voluntary PRPs a contribution right in these circumstances. Pet. App. 26a.

would expose other potentially responsible parties to the possibility of double liability. *See* U.S. *Amicus* Br. at 28. The scenario evidently envisioned by the government would involve a suit by the EPA under Section 107(a) against a PRP that already had been sued by a voluntary remediator. According to the government, such a follow-on suit by the EPA could subject the target PRP to "double liability."

This argument is meritless and confuses the two types of liabilities created by Section 107(a). In the scenario contemplated by the government, the first suit by a PRP against another PRP would be for the response costs incurred in the voluntary remediation. Neither party in that circumstance could plausibly claim to have litigated or resolved any liability *to the United States*. Were the government to initiate an enforcement action, it invariably would involve the claim that the *United States* incurred response costs in connection with the site—either because it engaged in cleanup directly or for some other reason. No "double liability" can exist in these circumstances because the government would be seeking to resolve liabilities owed to it, rather than the liabilities owed by the defendant PRP to the voluntary remediator. Moreover, a follow-on suit by the United States inevitably would involve the claim that the initial voluntary cleanup activities were not sufficient to remedy the hazardous release. No "double liability" can exist where the government seeks to recover the costs of completing an inadequate cleanup.

2. *Statute of Limitations*: Both Cooper and the government contend that Congress did not intend for CERCLA to afford PRPs the right to recover voluntary cleanup costs because Section 113(g)(3) does not provide a statute of limitations to govern such claims. *See* Cooper Br. at 31-32; U.S. *Amicus* Br. at 22. This argument is misplaced, however, because the express terms of Section 113(g)(2) provide the statute of limitations for Aviall's suit. Section 113(g)(2) states that "[a]n initial action for recovery of the costs referred to in section 107 must be commenced, for a removal action, within 3 years after completion of the removal action . . . and for a remedial action, within 6 years after initiation of

physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2). Because there have been no government enforcement proceedings in this case, Aviall's suit is the "initial action for recovery" of response costs under Section 107 and is therefore governed by the statute of limitations in Section 113(g)(2). *See Sun Co.*, 124 F.3d at 1192 ("Nothing in [Section 113(g)(2)'s] language . . . excludes a contribution action, which also seeks to recover an equitable portion of 'costs referred to' in § 107, provided that particular contribution action is the 'initial action' to recover such costs.").

Moreover, the absence of an express statute of limitations is "a void which is commonplace in federal statutory law." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (internal quotation marks and citation omitted). Indeed, many comprehensive federal statutes lack an express limitations period. *See, e.g., id.* at 266 (42 U.S.C. § 1983); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987) (RICO); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983) (LMRA). Accordingly, even if Section 113(g)(2) were not applicable to Aviall's claim, the absence of an express statute of limitations governing contribution actions by voluntary remediators would say nothing about whether Congress intended to authorize such suits.

3. *The Contribution Protection Scheme*: Equally unavailing is the contention that suits by voluntary remediators would eviscerate CERCLA's contribution protection for parties that settle with the government. Section 113(f)(2) provides that a person who has entered into a settlement with the United States or a State is not subject to contribution claims for matters covered in the settlement. 42 U.S.C. § 9613(f)(2). This provision operates to bar contribution actions otherwise saved by Section 113(f)(1)'s savings clause, just as it precludes contribution actions independently authorized by the first sentence of Section 113(f)(1). Accordingly, the fact that Aviall's claim is preserved by the savings clause does not threaten the protection that CERCLA gives to parties that settle with the government.

4. *Equitable Apportionment of Response Costs*: Cooper and the government also intimate that suits by voluntary remediators would frustrate Congress's desire to have response costs allocated equitably. But a voluntary remediator could not use a cost-recovery claim as a means of shifting more than its equitable share of the response costs to other parties, given that contribution actions (including those saved by Section 113(f)(1)) are governed by equitable principles. Lest there be any doubt, a defendant could file a counterclaim—as Cooper did in this case—or implead additional parties. *See Amcast*, 2 F.3d at 748 (a PRP that "has been sued is entitled to seek, by way of counterclaim, contribution from the plaintiff for the amount of response costs fairly attributable to the conduct of the plaintiff as distinct from that of the defendant"). There accordingly is no danger that Cooper will be saddled with a greater proportion of the cleanup costs than is equitable under the circumstances.

E. A Contrary Rule Would Undermine CERCLA's Remedial Scheme And Effectively Immunize The Federal Government From Substantial CERCLA Liability.

The foregoing discussion demonstrates that it is the position advanced by Cooper and the government—and not by Aviall—that would lead to anomalous outcomes and create untoward incentives under CERCLA. The rule advocated by Cooper and the government would impede CERCLA's twin aims by discouraging voluntary cleanups and hampering efforts to apportion response costs among PRPs in an equitable fashion. It also would penalize companies that are currently engaged in the voluntary remediation of hazardous waste by denying them the opportunity to recover a portion of their costs from other responsible parties. And it would effectively immunize the federal government from its share of CERCLA liability at the many sites that are now being remediated on a voluntary basis.

1. The rule proposed by Cooper and the government would introduce mischief into CERCLA's remedial scheme. In particular, the rule would unaccountably reward recalcitrant parties that refuse to comply with federal abatement orders and punish companies that comply *ab initio* with such orders by depriving them of contribution rights. This result would clearly undermine CERCLA's objective of encouraging prompt and voluntary cleanup.

The most basic and fundamental weapon available to the federal government to compel cleanup under CERCLA is an abatement order under Section 106. *See* 42 U.S.C. § 9606(a). Under the position espoused by the government, a party that *voluntarily* complied with such an order would have *no* contribution rights against other PRPs to recover a portion of its response costs. This is because the enabling clause of Section 113(f)(1) refers to a "*civil action* under section 106," and the issuance of an administrative order alone does not constitute such an action. The government itself—and the dissenters below—recognize as much. *See* U.S. *Amicus* Br. at 22 n.11 ("EPA's issuance of a Section 106(a) administrative order does not generally entitle the recipient to seek contribution under Section 113(f)(1)."); Pet. App. 36a n.34 (Garza, J., dissenting) ("§ 113 permits contribution actions following an administrative remedial order only when the government files suit in federal court under § 106 to enforce the order.").

By contrast, under Cooper's theory, a party whose refusal to comply with a Section 106 abatement order induced the federal government to sue to enforce that order *would* have contribution rights available to it. That cannot be correct. When Congress enacted SARA, it could not possibly have intended to deprive responsible corporate citizens of contribution rights while rewarding recalcitrant parties with them. But that is precisely the consequence that would flow from the position advanced by Cooper and the government.

2. The rule espoused by Cooper and the government also would undermine CERCLA's key aims by deterring voluntary cleanups. Private companies that are currently en-

gaging in the voluntary remediation of sites in reliance upon their presumed right to file suit thereafter to recover a portion of their expenses would be unable to recoup cleanup costs unless a Section 106 or Section 107(a) action were initiated against them or they reached a settlement with either the United States or a State. Under such a framework, PRPs would understandably be reluctant to incur further voluntary response costs because "[w]ithout the benefit of section 107(a)(4)(B), any responsible person who voluntarily comes forward to cleanup a site would be subjected to liability for the entire clean-up cost." *New Castle County*, 642 F. Supp. at 1264-65. Indeed, "[i]t is not hard to imagine that such a system would discourage voluntariness but would instead invite responsible individuals to adopt a 'wait and see' attitude." *Id.* at 1264-65; *see also* Pet. App. 88a (Wiener, J., dissenting) ("[Cooper's position] encourages PRPs to postpone, defer, or delay remediation and to 'lie behind the log'").

3. The federal government also stands to gain a tremendous windfall. The federal government is itself a PRP at numerous sites throughout the country and would effectively be given a veto over the right of other PRPs to seek contribution from it if the decision below were reversed.

The federal government faced $307 *billion* in environmental liabilities at the end of fiscal year 2001. *See* Gen. Accounting Office, *Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities* (GAO-03-219) (2003). At the end of fiscal year 2002, 158 of the 1,233 sites included on CERCLA's National Priorities List—a listing of the Nation's most-contaminated sites—were owned or operated by the United States. *See* Gen. Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850) (2003).

In light of these staggering liabilities, the federal government has pursued a litigation strategy in which it has advocated conflicting legal theories in an apparent effort to minimize its exposure under CERCLA. For example, in *Centerior Service*, the government sought to persuade the

court that actions for joint and several liability cannot be brought by PRPs against other PRPs because *contribution* claims are available to such parties. 153 F.3d 344. As part of its presentation, the government adopted a number of positions that are diametrically opposed to the arguments it makes here:

- The government argued that Section 113(f)(1) does *not* limit PRPs to pursuing contribution actions "during or following" Section 106 or 107(a) civil actions. U.S. Br. at 28, *Centerior* (No. 97-3163). Instead, it contended—as Aviall does here—that Section 113(f)(1)'s enabling clause is *not* restrictive and that the plain language of the savings clause permits contribution even in the *absence* of an underlying civil action. *Id.* at 28-29. According to the government, any contrary construction "would not only read out the last sentence of CERCLA Section 113(f)(1), but it would also dramatically alter the common law by requiring liable parties to bring joint and several liability actions and barring their actions in contribution." *Id.* at 29.

- The government argued that, under the accepted definition of the term, a settlement or a judgment is not a prerequisite to a "contribution" action. *Id.* at 30.

- The government contended that the language of Section 113(f)(1)'s enabling clause was satisfied "because plaintiffs' action arises under CERCLA section 107 in the first instance, [and thus] the contribution action is itself 'during' a CERCLA section 107 action." *Id.* at 29 n.29. Under this reasoning, Aviall's contribution claim also has been brought "during" a Section 107(a) action and thus

> comports with the "during or following" limitation in Section 113(f)(1)'s enabling clause.

Having successfully persuaded the *Centerior* court to hold that Section 107(a) actions for joint and several liability are not available to PRPs, the government now seeks to preclude PRPs from recovering voluntarily incurred cleanup costs through the very *contribution* mechanism it identified and endorsed in that case—and in many others.[15]

The government stands to receive an extraordinary windfall under this rule. At any site at which the federal government is a PRP, no private party would be authorized to initiate a contribution claim against it in the absence of a CERCLA enforcement action brought by the federal government or a State. Because it is rare for state regulators to file suit under CERCLA, rather than relying upon state-law remedies, such a rule effectively hands the federal government the keys to its own CERCLA liability and would afford the government the power to avoid any liability by declining to initiate enforcement actions.

This rule is wholly inconsistent with Congress's clear intent that the United States be treated under CERCLA just like any private party. *See* 42 U.S.C. § 9620(a) ("Each department, agency, and instrumentality of the United States . . . shall be subject to . . . this Act in the *same manner and to the same extent*, both procedurally and substantively, *as any*

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15 *See, e.g.*, U.S. *Amicus* Br. at 3-4, *Akzo Coatings* (No. 92-3820) (CERCLA "authorizes private persons to bring actions to recover response costs which they incur at a site, whether those actions are taken under compulsion by EPA *or voluntarily*. 42 U.S.C. § 9607(a)(4)(B).") (emphasis added); U.S. Reply Br. at 20, *In re Reading*, 115 F.3d 1111 (3d Cir. 1997) (No. 95-1987) ("Contrary to Reading's belief, the United States does not argue that a Section 113 contribution claim arises only when the government brings an enforcement action;" rather, such a claim arises upon the PRP's "payment of response costs"); U.S. *Amicus* Br. at 18-19, *Pinal Creek* (No. 96-16334) ("[W]hether a party has cleaned up voluntarily or pursuant to a judgment . . . or settlement is irrelevant to whether an action lies in contribution.").

nongovernmental entity, including liability under section 107 of this Act.") (emphases added). The lower courts are unanimous in the view that the waiver of sovereign immunity in CERCLA Section 120 was designed to put private parties and the government on an equal footing. *See, e.g.*, *FMC Corp. v. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994) ("when the government engages in activities that would make a private party liable if the private party engaged in those types of activities, then the government is also liable [under CERCLA]") (emphasis omitted).

4. This consequence also puts the asserted availability of state-law contribution claims into appropriate perspective. Cooper and the government make much of the fact that state-law contribution actions provide an alternative means for PRPs to recover voluntary remediation costs. That alternative is more theoretical than real. As an initial matter, substantial questions exist with respect to whether such claims are preempted by CERCLA. *See Bedford Affiliates v. Sills*, 156 F.3d 416, 426-27 (2d Cir. 1998) (CERCLA preempts state-law contribution and restitution claims); *In re Reading*, 115 F.3d at 1117 (state-law contribution claims preempted). Even if such state-law claims are not preempted, they are of little use against the United States, which has asserted—and will undoubtedly continue to assert—that sovereign immunity bars such claims. *See OSI, Inc. v. United States*, 285 F.3d 947, 953 (11th Cir. 2002) (holding that waste disposal decisions constitute discretionary functions that involve an element of judgment or choice and therefore are subject to the discretionary function exception to the Federal Tort Claims Act); *Aragon v. United States*, 146 F.3d 819, 827 (10th Cir. 1998) (same).

5. Finally, a contrary result would upset a decade's worth of settled expectations about how CERCLA operates. Since CERCLA's enactment, it has been widely accepted that the statute affords a contribution right to voluntary remediators. The United States has repeatedly and consistently endorsed that view in the lower courts. *See, e.g.*, U.S. *Amicus* Br. at 3-4, *Akzo Coatings* (No. 92-3820); U.S. Reply

Br. at 20, *In re Reading* (No. 95-1987); U.S. *Amicus* Br. at 18-19, *Pinal Creek* (No. 96-16334). As the court of appeals recognized, despite the millions of dollars at stake and the resources and legal sophistication available to CERCLA's repeat players, the prevailing understanding has been so firmly entrenched that few parties have ever *contended* that voluntary remediators lack contribution rights. *See* Pet. App. 29a ("The absence of direct precedent is like the dog that didn't bark."). In reliance on these background contribution rules, countless companies have formulated business plans, entered into acquisitions, accepted government contracts, and initiated voluntary cleanup activities. To undermine the foundation on which these arrangements have been built—when such a result is contrary to the text, purpose, and legislative history of the statute—would be unjustified, unwise, and unfair.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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April 8, 2004

No. 02-1192

FILED
APR 8 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

AVIALL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WASHINGTON, WISCONSIN, AND WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The *amici curiae* States, through their Attorneys General, respectfully request that the Court reject the argument, advanced by Petitioner Cooper Industries, Inc. and the United States as *amicus curiae*, that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, does not provide a right to contribution except where CERCLA also specifies a limitations period for a contribution claim. There is no question that CERCLA § 113(f)(3)(B) [42 U.S.C. § 9613(f)(3)(B)] – a provision whose construction is not directly implicated by the present case – expressly provides for a right of contribution after a potentially responsible party ("PRP") resolves its liability with a State (or the United States) by way of an administrative settlement. Yet, neither CERCLA § 113(g)(3) [42 U.S.C. § 9613(g)(3)], nor any other provision of the statute, establishes a period of limitations for bringing such a contribution claim. Given the importance of the right to contribution as an incentive to settle with a State, the *amici* States oppose assigning unwarranted significance to Congress' failure to identify a specific period of limitations, particularly where Congress explicitly grants a right to contribution elsewhere in the statute.

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), provides a comprehensive mechanism for cleaning up hazardous waste sites, and for imposing the costs of cleanup on those responsible for the contamination. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 55-56 (1998). To this end, the States, in conjunction with the federal government, play a critical role. For example, States participate in the planning, selection, and

implementation of remedial actions. CERCLA § 121(f), 42 U.S.C. § 9621(f); 40 C.F.R. §§ 300.500-300.525 (2003). The President, acting through the United States Environmental Protection Agency, may take no remedial action under CERCLA unless the State in which a release occurs enters into a contract or cooperative agreement with the federal government. CERCLA § 104(c)(2)-(3), 42 U.S.C. §§ 9604(c)(2)-(3). Moreover, if a State cleans up a site, it may sue any PRP to recover response costs "not inconsistent with the national contingency plan," the same statutory standard applicable to cost-recovery actions brought by the United States. CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

Of particular significance here, CERCLA provides a considerable incentive for PRPs to enter into administrative or judicially approved settlements with the States (or the United States). A party that resolves its liability by way of such settlement benefits from the ability to seek contribution from other PRPs under § 113(f)(3)(B). In addition, the settling party "shall not be liable for claims [by nonsettling PRPs] for contribution regarding matters addressed in the settlement." CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2). Thus, "potentially responsible parties who choose to settle gain protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants." *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998); *see also United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (3d Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995) (noting that CERCLA is "designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle") (internal quotations omitted). As a practical matter, these incentives are critical to the smooth functioning of the

administrative process and the cleanup of many sites without the burdens and expenses of litigation. The *amici* States, therefore, have a strong interest in opposing the "limitations period" argument advanced by Petitioner and the United States to the extent that it may enable others in the future to undercut the express right of a PRP who settles administratively with a State to seek contribution under § 113(f)(3)(B) from other PRPs.

SUMMARY OF ARGUMENT

Contrary to the suggestions of both Petitioner and the United States, the fact that CERCLA § 113(g)(3) expressly provides a period of limitations for bringing a contribution claim in certain circumstances should not be interpreted to mean that in any instance where CERCLA fails to establish a period of limitations, a right to contribution does not exist. As with § 113(f)(3)(B), which expressly authorizes a PRP that resolves its liability with a State (or the United States) by way of an administrative settlement to bring a contribution action against nonsettling PRPs, Congress often has enacted statutes that create causes of action without providing corresponding periods of limitations. The *amici* States thus urge the Court to assign no significance to CERCLA's failure to identify a specific period of limitations, particularly where Congress has explicitly granted a right to contribution elsewhere in the statute.

ARGUMENT

I. THE ABSENCE OF A LIMITATIONS PERIOD IN CERCLA § 113(g)(3) FOR A CONTRIBUTION ACTION THAT FOLLOWS A VOLUNTARY CLEANUP OF A CONTAMINATED SITE DOES NOT DIMINISH ANY RIGHT TO CONTRIBUTION PROVIDED BY CERCLA.

The central issue before the Court is whether CERCLA § 113(f)(1) [42 U.S.C. § 9613(f)(1)] authorizes a PRP to seek contribution under CERCLA from another party where, as here, it is undisputed that the PRP has not: (1) been sued civilly by the federal government under CERCLA § 106 [42 U.S.C. § 9606] to abate the actual or threatened release of a hazardous substance from a facility, or by either the federal government or a State under CERCLA § 107(a) [42 U.S.C. § 9607(a)] to recover response costs; or (2) otherwise resolved its liability to the federal government or a State through an administrative or judicially-approved settlement. Petitioner and the United States assert that in this circumstance, a PRP may not seek contribution under CERCLA. In an effort to bolster that statutory interpretation, they argue that the absence of any limitations period in CERCLA § 113(g)(3) to govern Respondent Aviall Services, Inc.'s contribution claim "provides further evidence that Congress did not intend to create a federal right to contribution in [the present] situation." U.S. Br. 21-22; *see also* Pet. Br. 31-33.

The fact that CERCLA expressly provides for a period of limitations in one instance, however, does not mean that only those contribution actions for which CERCLA provides an express period of limitations may be brought pursuant to

the statute. Section 113(g)(3) imposes a three-year period of limitations for contribution actions brought: (1) during or following a § 106 or § 107(a) action; (2) after a *federal* administrative settlement pursuant to CERCLA §§ 122(g)-(h) [42 U.S.C. §§ 9622(g)-(h)]; and (3) after any judicially approved settlement. Neither § 113(g)(3), nor any other provision of CERCLA, establishes a limitations period for contribution actions brought after a *State* administrative settlement. Nonetheless, § 113(f)(3)(B) expressly provides that a PRP who enters into a settlement with a State may bring a contribution action against other PRPs: "A person who has resolved its liability to . . . a State for some or all of a response action or for some or all of the costs of such action . . . in an administrative . . . settlement may seek contribution from any person who is not party to [the] settlement[.]" Particularly in view of this clear statutory language, which provides a significant incentive for PRPs to settle their liability with State environmental authorities, *see Bedford Affiliates*, 156 F.3d at 427; *United Techs. Corp.*, 33 F.3d at 103, the Court should refrain from adopting any argument that may undermine the contribution right provided by § 113(f)(3)(B).

There is no question that this case involves a dispute over the interpretation of § 113(f)(1), not § 113(f)(3)(B). In § 113(f)(1), the first and last sentences – the "enabling" and "savings" provisions – read as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a) [42 U.S.C. § 9607(a)]. . . . Nothing in this

> subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or 107 [42 U.S.C. §§ 9606 or 9607].

The Fifth Circuit's *en banc* majority reads the savings provision literally in holding that "'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action." *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 681 (5th Cir. 2002).

To support their contrary interpretation of § 113(f)(1)'s savings provision, Petitioner and the United States rely in part on § 113(g)(3), which establishes limitations periods for contribution actions in a variety of circumstances. That section reads as follows:

> Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> > (A) the date of judgment in any action under this Act for recovery of such costs or damages, or
> >
> > (B) the date of an administrative order under section 122(g) [42 U.S.C. § 9622(g)] (relating to de minimis settlements) or 122(h) [42 U.S.C. § 9622(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

Petitioner and the United States assert that because § 113(g)(3) provides no statute of limitations in the absence

of either an action under §§ 106 or 107(a), an administrative settlement with the federal government under § 122(g)-(h), or a judicial settlement with the federal government or a State, Congress could not have intended to *imply* a right to contribution under § 113(f)(1) for parties who voluntarily cleanup a contaminated site in the absence of a triggering event under § 113(g)(3). Pet. Br. 31-33; U.S. Br. 21-22. If accepted without qualification, this argument could have serious ramifications for State environmental enforcement authorities throughout the Nation.

Where CERCLA grants a right to contribution, the presence or absence of a limitations period in § 113(g)(3) establishes nothing more than a Congressional omission, intentional or otherwise. Indeed, although the statute fails to provide a period of limitations in § 113(g)(3) for contribution actions brought by a PRP who resolves its liability to the State by way of an administrative settlement, § 113(f)(3)(B) expressly establishes a right to such contribution. Unless one is prepared to ignore the express language of that statute, the absence of a limitations period alone cannot preclude a PRP who settles administratively with a State from bringing a contribution action pursuant to CERCLA.[1]

---

1. Numerous federal courts have held that a PRP also may seek contribution where the federal government has issued an administrative order pursuant to CERCLA § 106(a), but has not yet brought a civil action under § 106 to enforce that order. *See, e.g., Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998); *General Elec. Co. v. American Ann. Group, Inc.*, 137 F. Supp. 2d 1 (D.N.H. 2001); *Barmet Alum. Corp. v. Doug Brantley & Sons, Inc.*, 914 F. Supp. 159 (W.D. Ky. 1995); *Gould Inc. v. A&M Battery & Tire Serv.*, 901 F. Supp. 906 (M.D. Pa. 1995). Although the United States takes a diametrically opposite position in a footnote in its brief (U.S. Br. 22 n.11), that issue is not presently before the Court and need not be addressed.

To be sure, when CERCLA was enacted in 1980 and amended in 1986, it was far from unusual for Congress to create a cause of action but fail to provide a pertinent period of limitations, thereby leaving it to the courts to "borrow" an appropriate applicable period from other sources of law. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33 (1995) (noting that "[a] look at this Court's docket in recent years" demonstrates the frequency of that circumstance); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) ("Congress ordinarily intends" for such borrowing "by its silence"); *Reed v. United Trans. Union*, 488 U.S. 319, 323 (1989) ("Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action."). Although Congress has since eliminated the need to borrow periods of limitation from other sources of law for statutes passed after December 1, 1990,[2] CERCLA was enacted and amended prior to that date.

The fact that Congress frequently omits express periods of limitation, therefore, weighs against any attempt by Petitioner and the United States to vest § 113(g)(3)'s silence with undue significance.[3] The Court thus should refrain from

2. December 1, 1990 is the effective date of 28 U.S.C. § 1658(a), "which supplies a general, 4-year limitations period for any federal statute subsequently enacted without one of its own." *North Star*, 515 U.S. at 34 n.*.

3. In fact, the lower federal courts routinely have found that a PRP who settles its liability administratively with a State may bring a contribution action pursuant to CERCLA § 113(f)(3)(B) in the absence of any limitations period, but the courts have differed as to which period of limitations applies in that circumstance. *See, e.g., Union Station Assocs. LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. (Cont'd)

adopting without limitation any argument that may have the unintended effect of undermining the States' significant interest in preserving the incentive provided by § 113(f)(3)(B) for PRPs to enter into administrative settlements with State environmental authorities. *See Bedford Affiliates*, 156 F.3d at 427; *United Techs.*, 33 F.3d at 103.

(Cont'd)
2d 1226 (W.D. Wash. 2002) (finding right of contribution and applying three-year period of limitations from § 113(g)(3)(B)); *Sherwin-Williams Co. v. ARTRA Group, Inc.*, 125 F. Supp. 2d 739 (D. Md. 2001) (applying statutes of limitation provided by § 113(g)(2)); *W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 U.S. Dist. LEXIS 18091 (W.D.N.Y. Nov. 2, 2000) (applying no statute of limitations where none of the "triggering events" of § 113(g)(3) were present); *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995) (same). In other instances, too, federal courts have held that a right to contribution lies even where CERCLA provides no express period of limitations to govern the action. *See, e.g., City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153 (D. Kan. 2000); *Advanced Micro Devices, Inc. v. National Semiconductor Corp.*, 38 F. Supp. 2d 802 (N.D. Cal. 1999); *Kaufman & Broad-South Bay v. Unisys Corp.*, 868 F. Supp. 1212 (N.D. Cal. 1994).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 8 - 2004
OFFICE OF THE CLERK

No. 02-1192

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* SUPERFUND SETTLEMENTS PROJECT, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, ENVIRONMENTAL TECHNOLOGY COUNCIL, UTILITY SOLID WASTE ACTIVITIES GROUP, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 02-1192

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* SUPERFUND SETTLEMENTS PROJECT, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, ENVIRONMENTAL TECHNOLOGY COUNCIL, UTILITY SOLID WASTE ACTIVITIES GROUP, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae Superfund Settlements Project, American Chemistry Council, American Petroleum Institute, Corporate Environmental Enforcement Council, Environmental Tech-

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

nology Council, Utility Solid Waste Activities Group, Edison Electric Institute, and American Gas Association represent diverse sectors of American industry. For more than twenty years, their member companies have been actively involved in performing cleanups at hundreds of contaminated sites throughout the United States at a cumulative cost well in excess of $10 billion.

These private sector cleanups are the fruit of EPA's basic policy decision twenty years ago that "[i]t is . . . preferable for private parties to conduct cleanups themselves . . . ."[2] But private-sector cleanups would be discouraged and delayed if the right of contribution under CERCLA[3] were now to be restricted, as urged by Petitioner and the Government as *amicus curiae*.[4]

The right of contribution is the sole mechanism that allows the member companies of *amici curiae* to collect from other liable parties their equitable shares of the cleanup costs.[5]

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[2] U.S. EPA, *Hazardous Waste Enforcement Policy* (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

[3] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), is more commonly known as "Superfund."

[4] Nowhere in its brief does the Government address the inconsistency between its position as *amicus curiae* before this Court and EPA's 20-year old policy decision that it is "preferable for private parties to conduct cleanups themselves." Nor does the Government acknowledge the long history of CERCLA litigation in which the right of contribution has been recognized—expressly or implicitly—even in the absence of a prior civil action under CERCLA. *See, e.g., Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 208 (D. Conn. 2001).

[5] The Superfund Amendments and Reauthorization Act ("SARA") created § 113 of CERCLA, recognizing a right of contribution for potentially responsible parties ("PRPs"). *See* 42 U.S.C. § 9613(f)(1). Section 113(f)(1) "clarifies and confirms" the federal common-law right to seek contribution from other potentially liable parties under CERCLA. S. Rep. No. 99-11, at 43-44 (1985).

These member companies frequently perform cleanups—either voluntarily or at the request of government agencies—at sites where they are responsible for only a small share of the contamination. They agree to perform these cleanups, despite their relatively small shares of liability, in reliance upon the right of contribution, which allows them to compel other liable parties to pay an equitable share of the cleanup costs. If that right is restricted, these member companies will have little reason to step forward and perform cleanups while other companies that contaminated the same sites escape liability.

The Superfund Settlements Project ("SSP") is a non-profit association of major corporations with substantial experience in the Superfund program. The SSP's member companies represent a broad range of American industry. Organized in 1987, the SSP is dedicated to improving Superfund's implementation by reducing barriers to settlement, minimizing transaction costs, and using existing legal authorities to make the program faster, fairer, and more efficient. To date, the SSP's member companies have spent more than $6 billion on site cleanups.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a $462 billion enterprise and a key element of the nation's economy. ACC is committed to improved environmental, health and safety performance through Responsible Care©, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. Since 1980, ACC member companies have spent billions of dollars in Superfund taxes and Superfund cleanups.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 400 member companies engaged in all aspects of the oil and natural gas

industry, including exploration, production, transportation, refining, distribution and marketing. API frequently represents its members on important legal and policy matters before the courts, agencies, and legislative bodies. API's members are or have been directly involved in the remediation—including voluntary remediations—of numerous sites under CERCLA, often at great economic cost, and have a strong interest in the timing and process of contribution actions brought under that statute.

The Corporate Environmental Enforcement Council ("CEEC") is an organization of corporate counsel and environmental management representing 30 major companies from a wide range of industrial sectors, including metals, chemicals, pharmaceuticals, paper, oil refining and natural resource exploration, mining, food and home products. CEEC focuses on civil and criminal environmental enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policy makers. CEEC member companies are involved in investigation, removal and remediation activities at hundreds of Superfund sites across the United States.

The Environmental Technology Council ("ETC") is the national trade association for the commercial hazardous waste management industry. ETC firms provide technologies and services to customers for the recycling, treatment and secure disposal of industrial and hazardous wastes, including the cleanup of contaminated industrial sites. Many ETC members are also involved in RCRA corrective action cleanups at their own properties.

The Utility Solid Waste Activities Group ("USWAG") was formed in 1978, and is an association primarily dedicated to assisting its members in the management of wastes, the

beneficial use of materials associated with the generation, transmission, or sale of electricity and natural gas, and the remediation of contaminated sites in an environmentally-protective and cost-effective manner. Its membership is comprised of approximately 80 energy industry operating companies as well as several energy industry associations, including the Edison Electric Institute ("EEI") and the American Gas Association ("AGA"). EEI is the national association of investor-owned electric utility companies and acts as spokesman for those firms on subjects of national interest. AGA is the national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S. and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

Disposition of the issue raised in this case will have a direct effect on *amici curiae* and their member companies. If the right of contribution were to be restricted, as urged by Petitioner and the Government, then many member companies would find themselves in an untenable position. They have already agreed to perform many costly cleanups for which they should only be partially responsible, without waiting to be sued under CERCLA. Yet they would now lose their only effective means of obtaining equitable contribution from other parties that are also responsible for the contamination but decline to share in paying the cleanup costs.

Additionally, *amici curiae* and their member companies would be adversely affected at many other sites that have not yet been addressed. If the right of contribution were to be restricted, then the incentive to perform these cleanups voluntarily would immediately be greatly reduced. Member companies would understandably be reluctant to begin cleanups unless they have first been sued under CERCLA and their right of contribution triggered and secured. As a result, some government agencies would effectively be compelled to

file suit against these member companies in order to obtain cleanups. The member companies of *amici curiae* would face increased and unnecessary litigation and other transaction costs.

Amici curiae agree with the Fifth Circuit's *en banc* determination that section 113(f) of CERCLA authorizes an action for equitable contribution whether or not the plaintiff has previously been sued under section 106 or 107 of CERCLA. Rather than presenting additional argument on this legal issue, which is adequately addressed by Respondent (and other *amici curiae* in support of Respondent), *amici curiae* will describe some of the intensely practical considerations that should inform the Court's analysis of this legal issue. In particular, *amici curiae* demonstrate that unless the judgment below is affirmed, the result would be to discourage and delay the cleanup of contaminated sites across the country.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case contained in the brief of Respondent.

SUMMARY OF ARGUMENT

CERCLA was enacted—and amended in 1986—to achieve a single overriding objective: the swift and effective cleanup of contaminated sites. Achieving this goal depends heavily on voluntary and cooperative action by the private sector at many thousands of sites around the country.

To encourage private parties facing potential CERCLA liability to perform cleanups *expeditiously*, Congress provided a right of equitable contribution. Restricting this right of contribution now would be directly contrary to the congressional objective.

Restricting the right of contribution would discourage and delay cleanups at many contaminated sites where both studies

and cleanups often proceed today without the need for any litigation. These include the many thousands of brownfields sites found throughout our inner cities and lower-income communities. They include the thousands of RCRA corrective action sites that are contaminated by decades of industrial activity. They include the thousands of sites contaminated by departments and agencies of the United States government. And they also include the many Superfund sites listed on EPA's National Priorities List.

Without any environmental or other benefit, restricting CERCLA contribution rights as Petitioner seeks would increase the transaction costs to governmental and private parties and divert government enforcement resources from addressing equally important concerns arising under other environmental laws.

ARGUMENT

RESTRICTING THE RIGHT OF CONTRIBUTION WOULD DISCOURAGE AND DELAY THE CLEANUP OF CONTAMINATED SITES, FRUSTRATING THE CENTRAL PURPOSE OF SUPERFUND.

In 1980, in response to the new and frightening problem of abandoned toxic waste sites,[6] Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[7] commonly known as "Superfund." The overriding objective of CERCLA was to achieve the swift and effective cleanup of contaminated sites.[8]

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[6] *See generally* John Quarles & Michael W. Steinberg, *The Superfund Program at Its 20th Anniversary*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10706 (2001).

[7] 42 U.S.C. § 9601 *et seq.*

[8] *See, e.g., Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("[I]t is clear that the statute was designed primarily to

To help achieve this ambitious goal, CERCLA combined the individually harsh elements of retroactive liability, strict liability, and joint and several liability into an unprecedented legal framework that is aptly described as Draconian. For example, a company that lawfully sent a small amount of waste to a disposal site many years ago may be singled out by EPA and compelled to spend millions of dollars cleaning up that site, even though many others are equally responsible, or more so, for the contamination.[9]

Within CERCLA's web of often disproportionate and potentially unfair liability, there is but one feature that holds out a promise of fairness and thus provides a very strong incentive for private parties to move forward swiftly to clean up sites. That feature is the right to seek equitable contribution from other liable parties.

From the inception of the Superfund program, EPA has viewed the right of contribution as a key incentive to encourage private parties to perform cleanups despite widespread objections to the new law's unfairness. EPA's thinking was highly pragmatic. Government simply does not have the resources to address all of the contaminated sites, nor is it often able to address those sites quickly or efficiently.

As early as 1984, therefore, EPA decided to implement CERCLA based on a fundamental policy choice: "It is . . . preferable for private parties to conduct cleanups themselves . . . ."[10] Building on that recognition, EPA committed itself to

facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes.").

[9] Although CERCLA does not expressly state the standard of liability, the courts have generally construed CERCLA § 107 liability to be retroactive, strict, and joint and several. *See, e.g., In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993).

[10] U.S. EPA, *Hazardous Waste Enforcement Policy* (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

"minimize impediments to voluntary cleanup."[11] EPA also pledged to support in court the equitable claims of companies that performed cleanups against companies that declined to participate.

In 1986, Congress ratified EPA's approach—and expanded it—in the Superfund Amendment and Reauthorization Act ("SARA"), Pub. L. 99-499 (1986). The right of equitable contribution was specifically confirmed by the addition of new section 113(f) to the statute. The logic behind this key feature of SARA was explained by this Court as follows:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and *Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.*[12]

Four years later, in 1990, EPA amended the National Contingency Plan ("NCP") that governs Superfund cleanups. At that time, EPA added a new Subpart H for the express purpose of clarifying how private parties should go about

[11] *Id.* at 5042.

[12] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion) (emphasis supplied, citations omitted), *overruled on other grounds, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Congress sought "to ensure the prompt and thorough cleanup of contaminated sites *largely through the enactment of Section 113(f).*" *See United States v. Compaction Systems Corp.*, 88 F. Supp.2d 339 (D.N.J. 2000) (emphasis supplied, footnote omitted).

performing cleanups with the goal of recovering their costs from other parties through contribution litigation.[13]

EPA explained its new Subpart H rules with reference to its long-standing policy governing the Superfund program:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.[14]

Similarly, EPA took pains to state that parties performing cleanups may file suit to recover their costs without awaiting the completion of the cleanups. In EPA's words:

> [R]equiring a party to incur *all* costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up *expeditiously*.[15]

EPA's reliance on the right of contribution as a powerful incentive for private-party cleanups has been highly successful, resulting in cleanup settlements with a cumulative value in excess of $20 billion.[16] Today, it is common for companies to agree to perform the entire cleanup at a contaminated site, even though their fair share of the problem may be

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[13] 40 C.F.R. pt. 300, subpt. H (2003).

[14] *National Oil and Hazardous Substances Pollution Contingency Plan* ("NCP"), 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) (codified at 40 C.F.R. pt. 300, subpt. H (2003)).

[15] *Id.* at 8798 (emphasis supplied).

[16] U.S. EPA, *Superfund Accomplishment Figures, Summary Fiscal Year (FY) 2003*, *available at* http://www.epa.gov/superfund/action/process/numbers.htm (Dec. 31, 2002). This figure is for Superfund sites only, and thus does *not* include the value of the many agreements to perform cleanups at brownfields sites, RCRA corrective action sites, federally owned sites, and voluntary cleanup sites, all of which are discussed *infra*.

relatively modest. Over 70% of the new Superfund cleanups each year are launched through agreements such as these.[17]

These agreements are possible precisely because the companies know they can seek equitable contribution from those that do not participate voluntarily.[18] However, if a CERCLA section 106 or 107 action were to become a necessary predicate to asserting such claims, the economically rational response in many instances would be for the companies to resist undertaking any new cleanup obligations until a governmental agency sues them under CERCLA.

Contrary to EPA's 20-year old policy decision that "it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination,"[19] Petitioner and the Government as *amicus curiae* now seek to restrict substantially the right of contribution. Doing so would discourage and delay the very cleanups that Congress sought to encourage and accelerate.[20] It would also obstruct the ability of those performing the cleanups to recover their costs from the other parties that are liable for the contamination.[21]

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[17] *Id.*

[18] *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (implicitly allowing contribution action to proceed without state or federal precursor action of any kind); *Westfarm Associates Ltd. P'ship v. Washington Suburban Sanitary Comm'n.*, 66 F.3d 669, 677 (4th Cir. 1995) (same).

[19] *Supra* n. 14.

[20] *See, e.g.*, John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002).

[21] The Government unrealistically suggests that CERCLA "does not prevent" a company from "first entering into a settlement" with EPA or its state counterpart, and *then* seeking contribution from other parties. Brief for the United States at 27 n.12. Not only is this option contrary to the

Moreover, the pool of government resources dedicated to enforcement of environmental laws is limited. In recognition of this fact, EPA maintains a detailed strategic plan to assure that its enforcement resources are allocated properly by, inter alia, "identify[ing] the most egregious violators and return[ing] them to compliance as quickly as possible."[22] Restricting the right of contribution would require EPA and its state agency counterparts to divert resources away from the pursuit of other important environmental enforcement priorities in favor of commencing otherwise needless CERCLA section 106 and section 107 litigation.[23]

This brief demonstrates the severe negative impacts that restricting CERCLA contribution rights would have in several recurring real-world situations. The right of contribution currently plays an important role in supporting timely and cost-effective cleanup at these sites. It also promotes reuse and redevelopment of thousands of additional contaminated sites that governmental agencies might otherwise never address.

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approach EPA has followed for the last 20 years, it is also unavailable as a practical matter. By "entering into a settlement," the Government means a CERCLA consent decree and a CERCLA complaint under section 107. EPA simply does not have the resources—or the desire—to draft and file such documents for the thousands upon thousands of contaminated sites that are in need of cleanup. Most of these sites are of no interest to EPA, which is fully occupied dealing with the sites on its National Priorities List. Thus, a company that asks EPA to make time to negotiate a set of documents for a site that is of no federal interest almost certainly will be turned down.

[22] U.S. EPA, *2003-2008 EPA Strategic Plan* at 113 (EPA-190-R-03-003), *available at* http://www.epa.gov/ocfo/plan/2003sp.pdf (Sept. 2003).

[23] Indeed, EPA's current Strategic Plan acknowledges that its ability to achieve its objectives for cleanup of contaminated sites could be adversely affected by a change in the current status of EPA's ability to rely upon private-party response. *Id.* at 72.

A. Brownfields Sites.

Most of this country's contaminated sites are very different from the roughly 1,240 Superfund sites on EPA's National Priorities List. America today is blighted by *hundreds of thousands* of sites that are smaller and less contaminated. These "brownfields" sites, heavily concentrated in our cities, take a huge economic and social toll on our nation.

However, most of these sites are not so contaminated as to present major threats to human health or the environment; as a result, federal and state regulators simply will never get around to ordering or performing cleanups. Thus, the only realistic potential for cleaning up these hundreds of thousands of sites is voluntary action by responsible parties.[24] Yet the disincentives to voluntary cleanups remain daunting.

Because these sites are contaminated, and because cleanup standards are uncertain and constantly changing, potential reuse or redevelopment of the land is discouraged. Fear of future CERCLA liability also chills the desire to perform cleanups for reuse or redevelopment. Because the sites cannot be reused or redeveloped until they are cleaned up, the cities in which they are located forfeit the property taxes that going businesses would generate. And because businesses are reluctant to invest in these sites, the communities in which they are located are deprived of the jobs and other economic benefits that would go hand in hand with redevelopment.

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[24] The Government acknowledges that "private parties have played, and will continue to play, a prominent role in cleaning up many of those [brownfield] sites." Brief for the United States at 27 n.13. Ironically, the Government fails to recognize that the private sector plays a far *more* prominent role in cleaning up the other categories of sites addressed *infra*: RCRA corrective action sites, sites polluted by the United States, Superfund sites, and sites being cleaned up under § 106 administrative orders issued by EPA.

In order to reverse these grim conditions and restore the nation's lower-income neighborhoods, the federal and state governments have enacted a host of programs over the past few decades. The most recent of these is the Brownfields Revitalization and Environmental Restoration Act of 2001, which provides many new incentives to help realize the goal stated in the title of the law itself.[25]

The new law's incentives include partial immunity from CERCLA liability for prospective purchasers of contaminated property, for property owners whose land is contaminated by pollutants migrating from contiguous properties, and for landowners who clean up property under a state cleanup program. Other pre-existing programs include enterprise zones and empowerment zones, each featuring tax benefits for companies that locate in these distressed areas.

Thus, the overwhelming governmental response to the challenge of brownfields sites is to *encourage* private industry to undertake cleanups on a voluntary basis and thereby trigger redevelopment. CERCLA's right of contribution plays a significant complementary role with these other incentives. It encourages companies to perform the cleanups first, postponing the inevitable disputes over which company should pay what share of the costs.

Restricting the right of contribution would fly in the face of this larger public policy. It would brand as a legal "volunteer" any company that performs a brownfields cleanup before the United States has filed suit against it under section 106 or 107 of CERCLA. Thus, the company that performed the cleanup would be denied equity on the ground that not enough litigation has been commenced against it! This absurd result can only delay the very cleanups that Congress sought to accelerate.

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[25] *See* Pub. L. No. 107-118, Tit. II, 115 Stat. 2356 (2002) The law also creates a brownfield grant program for local governments and non-profit organizations who redevelop brownfield sites.

B. RCRA Corrective Action Sites.

A second major group of contaminated sites is addressed through the corrective action program under Subtitle C of the Resource Conservation and Recovery Act ("RCRA").[26] This group consists of more than 6,500 active industrial facilities that handle, or formerly handled, hazardous wastes.[27] These sites, in contrast to the typical brownfields sites, are often heavily contaminated after decades of industrial operations. In 1984, Congress mandated that these facilities undergo "corrective action" under section 3004 of RCRA.[28]

"Corrective action"—another term for cleanup of past contamination—is typically implemented either through RCRA permits or through RCRA administrative orders on consent. The permits and orders are generally issued to the current site owners by the state environmental regulatory agencies, subject to overall EPA oversight of their programs.[29]

Site owners performing corrective action often seek equitable contribution from others under CERCLA,[30] and they have good reason to do so. One common fact pattern is that an

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[26] 42 U.S.C. §§ 6921-6939e.

[27] *See* http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#4 (last modified March 25, 2004).

[28] Section 3004(u) of RCRA provides that permits issued after enactment of the 1984 Amendments "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u).

[29] For example, such orders may be issued under §§ 3008(h) or 3013 of RCRA. 42 U.S.C. §§ 6928(h), 6934.

[30] EPA itself has championed the use of CERCLA to recover costs incurred at RCRA corrective action sites. *See United States v. Rohm and Hass Co.*, 2 F.3d 1265, 1272-75 (3d Cir. 1993).

industrial facility has been operated successively by two or more companies over many decades. RCRA typically looks only to the *current* owner to perform the cleanup,[31] but in fact it may be one or more of the *previous* owners that contributed most of the contamination at the site. Thus, the availability of a contribution remedy is a very important consideration for a company about to embark on a costly RCRA corrective action project.

On the other hand, restricting the right of contribution as urged by Petitioner and by the Government as *amicus curiae* would mean that a site owner performing corrective action has *no* ability to seek equitable contribution from others toward the costs of cleanup. This is because neither a RCRA permit nor a RCRA administrative order on consent qualifies as a "civil action" brought under sections 106 or 107 of CERCLA.

Moreover, restricting the right of contribution would encourage many site owners to resist, delay, and foot-drag in the implementation of RCRA corrective action. This unfair and illogical result benefits no one—not the community in which the facility is located, not the state agency overseeing the cleanup, and not the site owner.

C. Sites Polluted by the Federal Government.

Restricting the right of contribution would also produce uniquely unjust results at the many thousands of sites contaminated by the departments and agencies of the United States itself. These include not just the sites actually owned and operated by the United States, but also the many private sites to which the United States contributed waste.

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[31] *See, e.g.*, RCRA § 3013, 42 U.S.C. § 6934.

The docket of contaminated sites owned and operated by the federal government is staggering.[32] The United States owns and manages half a billion acres of land[33] containing more than 60,000 potentially contaminated sites.[34] Among these sites are former nuclear weapons production facilities, military bases, abandoned mines, landfills, and underground storage tanks.[35] According to the Government, the total cleanup cost for these sites is estimated to be at least $230 billion, and may be nearly twice that amount.[36]

Somewhat smaller, and somewhat harder to quantify, is the docket of privately-owned sites with contamination resulting in whole or in part from the activities of the federal government. These sites include waste oil recycling facilities that primarily served military bases,[37] nuclear fuel processing plants that helped support the Cold War weapons production

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[32] *See* House Comm. on Natural Resources, Subcomm. on Oversight and Investigation, 103D Cong., *Deep Pockets: Taxpayer Liability for Environmental Contamination* (Comm. Print No. 2 1993).

[33] The Department of the Interior alone manages over 440 million acres of federally owned land, and the Department of Defense manages another 25 million acres. *Superfund Reauthorization,* Hearings Before the Subcommittee on Water Resources and the Environment, 104th Cong., 1st Sess. 829, 834 (1995).

[34] According to the most recent government estimate, a total of 60,425 potentially contaminated sites are present on land owned by the Departments of Agriculture, Defense, Energy, and Interior. Federal Facilities Policy Group, *Improving Federal Facilities Cleanup* 17 (October 1995).

[35] *Id.*

[36] The most recent government estimates range from $234 billion to $388 billion in cleanup costs. *Id.*

[37] The Bridgeport Rental and Oil Services Superfund site in Logan Township, New Jersey is a good example. Its most prominent feature was a 13-acre oil lagoon that contained PCBs. Most of the oil originated at the nearby Philadelphia Naval Shipyard.

programs,[38] and disposal sites that accepted large volumes of waste from the government.[39]

EPA and state regulatory agencies seek to expedite the cleanups at these sites, but they are often unable to sue the federal department or agency that helped to create the problem.[40] Instead, they frequently approach private companies that also share the liability at these sites,[41] hoping the companies will agree to undertake the cleanups themselves.

In some cases, this can be a "win-win" approach. Some companies sign on to perform these massive cleanups, with the expectation that they can swiftly obtain equitable contribution from the United States.

But if the right of contribution were now restricted to parties that have been sued under sections 106 or 107 of CERCLA, then companies voluntarily cleaning up sites polluted by the United States would typically have no right of contribution. As a result, companies would be far less willing in the future to agree to perform such cleanups voluntarily.

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[38] *See, e.g., Westinghouse Electric Co. v. United States,* No. 4:03CV00861 SNL (E.D. Mo., filed June 26, 2003) (CERCLA complaint seeking contribution for cleanup of radioactive and hazardous contamination at former Hematite nuclear fuel processing plant in Festus, Missouri).

[39] For example, the Stringfellow Acid Pits site near Los Angeles, California counted nearby military installations among its major customers.

[40] EPA is typically prevented from suing other federal agencies because the Department of Justice views such cases as conflicts within the Executive Branch that present no justiciable case or controversy under article III of the Constitution. *See generally*, Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 Ecology L.Q. 317, 325-27 (1990). States are often prevented from suing the same federal agencies by the doctrine of sovereign immunity.

[41] These companies may include government contractors that operated the facilities for the United States.

Because EPA and its state agency counterparts cannot sue the federal agencies to compel them to clean up these sites, they will face a Hobson's choice.[42] Either EPA and the states will have to sue private companies at these sites, and those companies will then sue the United States for contribution, thereby burdening the courts with needless claims, or else the cleanups will be delayed indefinitely. Neither result can be squared with the central purpose of CERCLA.

D. Superfund Site Investigations.

Restricting the right of contribution would also discourage and delay cleanup in a fourth situation. It would preclude a responsible company from seeking equitable contribution toward the often considerable costs of investigating a Superfund site to determine the most appropriate method of cleanup. These site studies, collectively referred to as a Remedial Investigation and Feasibility Study ("RI/FS"),[43] are typically performed pursuant to an administrative order on consent issued under section 104 of CERCLA.[44] These studies are essential to the development and selection of an appropriate cleanup plan, regardless of who will actually perform the cleanup.

In many cases, the RI/FS studies take years to perform and cost several million dollars. But the studies are typically performed pursuant to an administrative order, and thus no litigation under sections 106 or 107 is involved. If the right of contribution were now restricted to those parties whom the United States has already sued under these sections, then the companies performing the RI/FS studies at Superfund sites would have no ability to seek equitable contribution. As a result, companies will be much less willing to enter into

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[42] *See* n. 40 *supra*.

[43] *See* 40 C.F.R. § 300.430 (2003).

[44] *See* 42 U.S.C. § 9604.

administrative orders on consent in the future to perform these critical studies. Either EPA will have to resort to litigation in order to coerce the work—and trigger the right of contribution—or else the work will, again, have to wait. Neither result comports with CERCLA's overriding objective.

E. Section 106 Unilateral Administrative Orders.

Restricting the right of contribution would also discourage and delay cleanup in another major category of Superfund sites. These are the sites where EPA issues unilateral administrative orders under section 106 of CERCLA to compel the performance of cleanup work. Denying contribution in these situations would be particularly illogical, unfair, and contrary to the goals of CERCLA.

For more than two decades, EPA has made extensive use of its authority to issue administrative orders under section 106 of CERCLA. More than 1,500 such orders have been issued to date. Because these orders carry extreme enforcement sanctions, including treble damages for noncompliance, they are extremely powerful tools.

In many cases, EPA has issued such orders to companies that bear a relatively small share of responsibility for the contamination found at a site. In the past, companies that performed cleanups under these orders were able to seek equitable contribution from others who were not named by EPA, or who were named but refused to comply.

All of this would change if the right of contribution were now to be restricted. The recipients of past, present, and future section 106 orders would be compelled to perform all of the work themselves, regardless of how small their share of responsibility for the contamination might be. These companies would typically have no effective legal recourse to compel others to contribute their fair shares of the cleanup costs.

Such a harsh and unfair outcome has little to recommend it. Indeed, many companies receiving section 106 orders may decline to comply, preferring to take their chances in court. If EPA sues to enforce the orders, then their right to seek equitable contribution would be triggered under the theory urged by Petitioner and by the Government.

Recognizing the harshness and absurdity of this result, the Fifth Circuit panel majority opinion asserted in *dictum* that section 106 orders somehow fit into the category of "civil actions" described in section 113(f).[45] But a unilateral administrative order generally is *not* considered a "civil action," as the dissenting panel member pointed out,[46] and as the Government argues here.[47]

It also may be suggested that the recipients of section 106 orders could regain their lost rights by requesting that EPA "convert" those orders into consent decrees under section 107. This would entail EPA's first suing the recipients under section 107, thereby triggering contribution rights under the majority panel opinion, and then simultaneously filing with the court a consent decree that resolved the new "litigation." But this convoluted approach has numerous flaws, and it cannot reasonably be what Congress had in mind.

First, the recipient of an order may only request—not compel—EPA to "convert" that section 106 order into a consent decree. EPA may refuse, for any reason at all, and the recipient has no further recourse.

Second, EPA may agree to the "conversion" only in exchange for additional concessions, such as reimbursement of EPA's claimed past costs. Those costs may be substantial, and may be poorly documented and of questionable validity.

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[45] 263 F.3d at 140 n.5.

[46] *Id.* at 147 (Wiener, J., dissenting).

[47] Brief for the United States at 22-23 n.11.

Third, the standard EPA consent decree for Superfund cleanups is such a one-sided document that signing it entails waivers of significant legal rights,[48] which should not be a prerequisite to exercising the right to seek equitable contribution.

Fourth, many Superfund sites consist of two or more operable units ("OUs"). Work on different OUs at a single site may be performed by different parties, some working under section 106 orders and others working under EPA consent decrees. Restricting the right of contribution leads to the inequitable result that some parties would be allowed to seek contribution at a site while others performing work at the same site would not.

Alternatively, a single party could be precluded from seeking contribution for cleaning up one OU pursuant to a section 106 order, but allowed to seek contribution for cleaning up another OU at the same site pursuant to a section 107 consent decree. These arbitrary distinctions do nothing to advance the objectives of CERCLA.

Fifth, even if EPA and the responsible parties were in complete agreement and wished to "convert" a section 106 order into a section 107 consent decree, doing so would burden the district courts with new section 107 complaints filed for the sole purpose of enabling parties that are already performing cleanups to exercise their statutory right to seek equitable contribution from other parties. Such litigation would be highly artificial. It would also represent a waste of scarce judicial, administrative, and private sector resources.

Sixth, restricting the right of contribution would result in a dysfunctional system for recipients of section 106 orders. Consider two hypothetical examples.

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[48] *See* Information Network for Superfund Settlements, *Superfund Cleanup Decision Handbook* (2d ed. 1995).

In the first case, an uncooperative party declines to perform the work until EPA sues it to enforce the section 106 order. At that point, the recipient is entitled to seek equitable contribution because a section 106 civil action is now ongoing.

In the second case, a fully cooperative party receives a section 106 order, performs all of the work, and incurs all of the cleanup costs itself. This party has no recourse to the courts for equitable contribution because it has not been sued under sections 106 or 107.

These results are exactly the opposite of what fairness and logic would dictate. Indeed, restricting the right of contribution in this way would encourage most recipients of section 106 orders to balk at complying, hoping that EPA will sue for enforcement, so they may then use those section 106 civil actions as springboards for their contribution claims. A more powerful deterrent to prompt cleanup is difficult to imagine.

F. Voluntary Cleanups.

Individuals, companies, and communities undertake voluntary remedial actions each year at hundreds of contaminated sites that federal and state environmental agencies simply have not addressed. These voluntary actions are undertaken for a variety of reasons, including the desire to promote redevelopment and reuse of land and the desire to reduce the uncertainty of potential future liability for cleanup costs.

In recognition of the benefits of voluntary actions such as these, numerous states and local governments have enacted voluntary cleanup programs that provide some combination of liability incentives and comprehensive standards. The goal of these programs is to encourage voluntary cleanup actions and to ensure that these private cleanups will be of high quality with minimal direct involvement by environmental agencies. The net result of these programs is that many more sites are cleaned up by voluntary private actions than would

ever be addressed if federal and state governmental agencies were acting alone.

Like the other categories of cleanups described above, voluntary cleanups often proceed more swiftly because the party performing the cleanup expects to obtain equitable contribution from other responsible parties. The risk of potential liability under a CERCLA contribution claim serves as a potent incentive to bring other parties to the negotiating table to address sites without the need for federal litigation under sections 106 or 107 of CERCLA.[49] Conversely, depriving private parties of the ability to equitably shift a portion of the cost of these voluntary efforts through contribution actions would deprive many private parties of the incentive—and perhaps even the means—to perform these beneficial cleanups.

G. State-Law Contribution Claims Do Not Provide the Incentive for Swift and Effective Cleanups.

Petitioner and the Government suggest that restricting the right of contribution might not discourage cleanups, because some companies might still be able to seek contribution under state law.[50] This suggestion is extremely optimistic, as the Fifth Circuit *en banc* majority recognized.[51]

First, CERCLA may preempt state-law contribution claims in many situations where no recovery would be available

[49] The parties performing the cleanup have every incentive to ensure that their actions are cost-effective, for they know that they can only recover from others in a contribution claim those costs that are "necessary," consistent with the National Contingency Plan, and reflective of the equitable shares of liability of those other parties. *See, e.g.*, John M. Hyson, *Private Party Contribution Litigation Under CERCLA*, 207-26, 241-73 (2003).

[50] Brief for Petitioner at 38; Brief for the United States at 27 n.12.

[51] 312 F.3d at 690-91 & nn. 28-30.

under CERCLA itself.[52] The evolving law on preemption may ultimately bar a plaintiff that lacks a CERCLA contribution claim solely because it has not been sued under sections 106 or 107.

Second, many defendants are not amenable to suit in state court because they have not done business in the pertinent state for many years and because the nationwide service of process that CERCLA § 113(e) authorizes in federal court is unavailable to plaintiffs filing in state courts.

Third, suits seeking contribution from the United States would frequently be barred by sovereign immunity, because CERCLA waives that immunity for state-law claims only at sites that are currently "owned or operated by" federal agencies.[53] Many privately-owned disposal sites are heavily contaminated with wastes contributed by the United States,[54] yet the parties cleaning up those sites would have no meaningful recourse under state law.

Fourth, vexing choice-of-law questions would bog down many contribution claims. Consider the relatively common situation where a company organized under the laws of State A, and doing business in State B, ships waste to State C for disposal, and the company is later acquired by a company doing business in State D. When the acquiring company is sued for contribution in State C on a theory of successor liability, which state's law would govern?

Fifth, state law varies widely from one jurisdiction to the next on such key issues as what hazardous substances are

[52] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998) (state common law restitution and indemnification actions conflict with and are preempted by CERCLA's carefully crafted settlement system).

[53] 42 U.S.C. § 9620(a)(4); *see, e.g., Miami-Dade County v. United States*, No. 01-1930-CIV, 2003 WL 22992271 (S.D. Fla. Dec. 3, 2003).

[54] *See* nn. 32-42 *supra*.

covered, which parties may be held liable, when contribution may be sought, and what costs may be recovered.

Thus, the patchwork of state-law contribution rights, with their attendant lack of predictability on basic issues of scope and coverage, cannot plausibly be viewed as a substitute for the federal right that Congress conferred.[55]

For all of the reasons described above, restricting the right of contribution would have extremely detrimental consequences. It would undermine the incentives for private-sector cooperation that EPA has leveraged so successfully over the past 20 years. Companies often will not voluntarily clean up brownfields sites without first being sued for fear that doing so will foreclose their right to recoup costs from others. Companies with sites in the RCRA corrective action program will be reluctant to perform cleanups under permits or administrative orders for fear of foregoing their right of contribution. At sites polluted by the federal government, the options for EPA and its state counterparts boil down to more litigation or slower cleanups—or both. Finally, companies involved at Superfund sites may be forced to seek out judicial involvement (e.g., by refusing to comply with section 106 orders) to trigger their right of contribution, thus increasing transaction costs and diverting governmental resources from other important environmental enforcement priorities.

All of these results fly in the face of what Congress sought to achieve by enacting—and amending—CERCLA. Accordingly, *amici curiae* urge affirmance of the *en banc* decision of the Fifth Circuit.

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[55] *See, e.g.*, John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002) (Fifth Circuit panel opinion restricting right of contribution "fails to explain why a Congress, bent on *encouraging* voluntary cleanups, would relegate cost recovery actions by volunteers to state courts") (emphasis in original, footnote omitted).

CONCLUSION

The judgment of the United States Court of Appeals, sitting *en banc*, should be affirmed.

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April 8, 2004